THE

MONTHLY LAW REPORTER.

JUNE, 1860.

IS PRIZE-FIGHTING LEGAL AT COMMON LAW?

We give below a sprightly article from the *Law Times*, of April 28, upon the subject which has lately engaged the attention and occupied the press of two of the leading nations of the world. The statutes in many of our States against prize-fighting, undoubtedly express the abhorrence which our people have of these exhibitions of the "masculine brutality of former times;" and the instinctive disgust excited by reading the accounts of the late contest for the championship, justifies and approves the law, making such barbarous fights upon our soil illegal, and branding with a felon's character all those that participate therein. Still, if any legal excuse can be sought out for the demonstrations made in England by lords, lawmakers, and subjects, in favor of the practice, and in honor of their champion, we are willing, for the credit of the boasted civilization of this age, to aid in making it known.

"Is prize-fighting a crime or a lawful diversion?" Such interest has been given to this question by the late great fight for the championship; such vital principles of the commonwealth are involved in the controversy whether a nation is to depend for its well-being on its *morale*, or at least partly on its *physique;* that it may be useful to investigate the legal aspect of this question at some length.

Undoubtedly prize-fighting has been stated by judges — perhaps has been assumed rather hastily — to be illegal; but when we look into the authorities we are struck with their vagueness and uncertainty. It is laid down generally in Blackstone's Com. 183, that "A tilt or tournament, the martial diversion of our ancestors, is an unlawful act: and so are boxing and sword-playing, the succeeding amusements of their posterity:" (cf. Archbold Crim. Pract. by Welsby, 12th ed. p. 512.) And for this doctrine the late cases of *R.* v. *Perkins*, 4 C. & P. 537; *R.* v. *Hargrave*, 5 C. & P. 170; and *R.* v. *Murphy*, 6 C. & P., 103, are usually cited. The still earlier case of *R.* v. *Billingham*, 2 C. & P. 234, may perhaps be noticed first, as containing the general view of the existing law. There, the prisoner was indicted for a riot and assault on D. Rogers, a magistrate, in the execution of his office. It appeared that Billingham and Savage had agreed to fight a pitched battle; and for that purpose they met at a place near Hagley, and about a thousand persons assembled to witness the fight. Mr. Rogers was applied to to prevent it; and for that purpose went with others to the place, and told them that they should not fight. The defendant Skinner said that they should; and a scuffle ensued between him and Mr. Rogers, who endeavored to apprehend him, which ended in a general tumult on the part of the mob, and the rescue of Skinner. Burrough, J. said: "By law, whatever is done in such an assembly by one, all present are equally liable for, — which ought to make persons very careful. It cannot be disputed that all these fights are illegal, and no court can make them legal; and all the country being present could not make them less an offence. This is an unlawful assembly, and every one going hither is guilty of an offence. The inconvenience in the country is not so great, but nearer London the quantity of crime these fights lead to is immense. My advice to magistrates and constables is, in cases where they have information of a fight, to secure the combatants beforehand, and take them to a magistrate, who ought to compel them to enter into securities to keep the peace till the next assize or session; and if they will not enter into such security, to commit them to prison."

So in *R.* v. *Perkins*, 4 C. & P. 537, the indictment was for a riot and assault on Robert Coates. It appeared that a prize-fight was fought between the defendant Perkins and

Robert Coates, and that another of the defendants named Weekly assisted as the second of the defendant Perkins, and that the other two defendants were present; the one collecting money for the combatants, and the other walking round the ring and keeping the people back. It appeared that many hundred persons were assembled, and that the defendant Perkins struck the first blow. Mr. Justice Patteson, in summing up, said: "It appears in this case that a great number of persons were assembled together on this occasion, and that there was a breach of the peace. It is clear that the parties went there intending that a breach of the peace should be committed. There is no doubt that prize-fights are altogether illegal; indeed, just as much so, as that persons should go out to fight with deadly weapons, and it is not at all material which party struck the first blow. It is proved that all the defendants were assisting in the breach of the peace; and there is no doubt that persons who are present on such an occasion, and taking any part in the matter, are all equally guilty as principals. If all these persons went out to see these men strike each other, and were present when they did so, they are all in point of law guilty of an assault. There is no distinction between those who concur in the act, and those who fight." The prisoners were found guilty of the riot, but not of the assault.

The law was laid down generally to the same effect in *R.* v. *Hargrave*, and also in *R.* v. *Murphy*, viz. that pugilistic encounters generally are illegal, and that all who participate in them, or second or assist at them, are guilty as principals.

Undoubtedly, if the law is to be considered as expressed adequately by these cases, not only is all prize-fighting illegal, but probably a multitude of amusements considered to be hitherto as harmless and permissible by the law of the country, may turn out to be serious criminal offences. But it is to be remarked that, in all the cited cases, the law was assumed rather than declared to be that which the learned judges affirmed it to be. The cases are at *Nisi Prius*, and no authority is cited in any one of them.

How then is prize-fighting illegal, and what is the denomination of the offence? In *R.* v. *Billingham*, it was treated as a riot and an assault. So it was in *R.* v. *Perkins*. Hence it would seem that it is practically one or the

other, unless it be an affray. But an affray must be in a public place, and to the terror of bystanders. Prize-fights are almost invariably in private places, and not *in terrorem populi*. Therefore a prize-fight is not an affray.

Then it is either a riot or an assault. But in a riot also "it seems to be clearly agreed that in every riot there must be some such circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike a terror into the people, as the show of armor, threatening speeches, or turbulent gestures; for every such offence must be laid to be done *in terrorem populi*. . . . Upon these principles, assemblies at wakes or other festival times, or meetings for the exercise of common sports or diversions, as bull-baiting, wrestling, and such like, are not riotous;" (1 Russ. Crimes, 267.) Also, a riot is defined by the same authority to be "a tumultuous disturbance of the peace by three or more persons assembling together, of their own authority, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner to the terror of the people, whether the act intended was of itself lawful or unlawful." (1 Russ. 266.) Now, if the quiet and amicable contest between Sayers and Heenan in private ground can be said to be *in terrorem populi*, undoubtedly it was a riot. So also is an amicable contest between two schoolboys with the gloves in their own playground. The intent to resist any who shall oppose them may be imputed constructively from such resistance as occurred or appeared in *R.* v. *Perkins* and *R.* v. *Billingham;* but if the act was not *in terrorem populi*, it may be presumed that the interruption, not the resistance, was illegal. The question also is, not whether constables may be resisted, but whether they have a right to interfere.

On this point *R.* v. *Hunt*, 1 Cox Crim. Cas. 177, is worthy of attention. There, the prisoners were indicted in one count for a riot, and in another for an affray. The evidence was that the first two had fought together amidst a great crowd of persons, and that the others were present aiding and abetting; that the place where they fought was a considerable distance from any highway, and when the officers made their appearance the fight was abandoned. The prisoners, on being required to do so, quietly yielded.

Alderson B.: "It seems to me that there is no case against these men. As to the affray, it must occur in some public place, and this is to all intents and purposes a private one. As to the riot, there must be some sort of resistance made to lawful authority to constitute it; some attempt to oppose the constables who are there to preserve the peace. The case is nothing more than this: two persons choose to fight, and others look on; and the moment the officers present themselves, all parties quietly depart. The defendants may be indicted for an assault, but nothing more."

If this case, decided by a most eminent judge, be law, prize-fighting is legal until police officers actually interfere; or, if it be an offence, it is an assault, which we take to be tantamount to a breach of the peace. But this aspect of the case suggests a new difficulty; for how can there be an assault where there is consent? An assault is an attempt with force or violence to do a corporal injury to another against his will: *ex vi termini* it excludes consent. (*Christopherson* v. *Ban*, 17 L. J. Q.B. 109;) and in a late case it seems to have been held clearly that there can be no assault without a hostile *animus* or intention: (*Coward* v. *Baddeley*, 28 L.J. 260, Ex.)

Such, then, are the difficulties in which the law affecting prize-fights is involved. Resting on loose *dicta*, which when tested appear to be unsupported by authority or principle; said sometimes to be a riot, sometimes an assault, and yet wanting the chief elements of those offences; it can hardly be said to possess either certainty or consistency. If prize-fighting be a riot, it is difficult to see how the commonest school-games, — cricket, rounders, prisoner's base in a private playground, — are not equally riotous and *in terrorem populi*. If it be a battery or an asssalt, then there may be both, or the latter, without a hostile intent. Not only is wrestling illegal, which Russell states expressly to be legal, but the commonest sports are equally so. For if the question be one of degree, where is the law of that degree; where is the written or unwritten code which permits boxing with gloves, and prohibits boxing without gloves; which allows of fencing and single-stick, but not of a permitted blow with the bare knuckles? Finally, if the isolated *dicta* of learned judges are conclusive, undoubtedly prize-fighting is illegal; but if we attempt to reconcile those *dicta* with principles, and even authority, the attempt is

hopeless. If prize-fighting be illegal, let it be declared to be so by the legislature. Otherwise, let us fear the judge-made law, which seeks, perhaps, to substitute only the dainty squeamishness of the present age for the coarse but masculine brutality of former times.

Circuit Court of the United States, Massachusetts District.

October Term, 1859.

In Equity.

ELIAS HOWE, JR., *v.* ALBERT MORTON, ET AL.

SAME *v.* CHARLES H. WILLIAMS.

In the decision of a motion for a preliminary injunction against the infringement of Howe's Sewing Machine patent, it was

Held, 1. That Howe's Sewing Machine patent (1st claim) secures his combination and arrangement of the parts co-operating to form the seam, as described.

2. That Howe's patent is not affected by the prior American patents of Bean, Greenough, and Corlis; nor by the foreign patents of Duncan, Thimonier, Newton & Archbold, and Fisher & Gibbons.

3. That an American patent is not affected by a foreign patent, made subsequent to the invention here.

4. That an invention is not "patented in any foreign country," in the sense of our patent acts, until it is made patent and known to the world by a sufficient specification and description.

5. That the Williams Sewing Machine and the Sloat Sewing Machine infringe Howe's patent.

In both these cases, which were heard together, the question was upon the motion for a preliminary injunction. A large amount of evidence was offered. The facts in the case sufficiently appear in the decision of Judge Sprague, which is given below.

B. R. Curtis and J. Giles were counsel for complainant.

C. Cushing, H. F. Durant, and A. C. Washburn, for respondents.

Decision by SPRAGUE, J., March 8, 1860.

I will now state the result at which I have arrived in both cases. As the matters involved in these two cases are complicated, and as I have no notes, and speak from memory merely, I may omit some of the considerations which have brought me to the conclusion at which I have

arrived. I believe, however, that I can state the reasons of my decision sufficiently to enable the counsel to understand the most material grounds upon which I proceed.

Here are two applications for preliminary injunctions, made to the court at the same time, in two distinct suits, founded on Howe's Sewing Machine patent, dated September 10, 1846. One suit is against the Williams machine, so called, and the other is against three different machines, called respectively the Sloat, the Johnson, and the Gibbs machine.

The defence relied upon is, that there is no infringement. The validity of Howe's patent is conceded. It is not impeached for the want of novelty, or as embracing too much in its claim of invention; nor is it contended that it does not embrace all that he did in fact invent.

The question is, whether the defendants have infringed. The various patents introduced, granted prior to this of Howe, have been introduced not to show his patent to be invalid for want of novelty, but to ascertain what there is new in it, by showing what was before known.

The inquiry is, what is there in common between the defendants' machines and the Howe machine, which is not in common between the Howe machine and the prior ones ? or, in other words, what do the defendants use that belongs to Howe. It being taken for granted that whatever is new in Howe's machine belongs to him and is secured by his patent; and it being insisted that nothing of that which is new and secured by his patent is used by the defendants in their machines. So that it is the question whether the defendants do use what belongs to Howe by his patent.

And here I would remark that this inquiry excludes various matters which have, properly enough, been gone into, as to the diversities between the defendants' and Howe's machines. No matter what the diversities are; or what additions to or modifications of Howe's original invention have been made by the defendants, if these new improvements are ingrafted upon Howe's invention, secured to him by his patent. The defendants may have taken Howe's machine as the basis and means from which to make their improvements. If they have taken what be-

longs to Howe, they have infringed, although with the improvements the machine may be much more useful than it would be without them. This is a well-known principle of patent law.

We are to inquire what there is in the defendant's machines that is taken from Howe's; and this induces the necessity of a comparison, in the first place, between Howe's patent and what was prior, in order to determine what there is in Howe's that is novel.

In examining Howe's patent let us look in the first place at the summing up, the first claim in which is as follows: "The forming of the seam by carrying a thread through the cloth, by means of a curved needle on the end of a vibrating arm, and the passing of a shuttle, furnished with its bobbin, in the manner set forth, between the needle and the thread which it carries, under a combination and arrangement of parts substantially the same with that described."

It is with this general claim that I shall have to deal. In giving a construction to a claim, we must look at the specification which precedes; and that is especially necessary in this case, because the claim makes express reference to the specification.

The summing up begins by claiming the forming of the seam. That is a result. The real claim, as subsequently stated, is for the means by which that result is reached, namely, by carrying a thread through the cloth, by means of the needle at the end of the vibrating arm, and then carrying the shuttle with its bobbin between the needle and its thread, under a combination and arrangement of parts substantially as described.

Some discussion has been had whether this is to be deemed a claim for a combination, or a claim for a machine. I do not think it necessary to classify this claim, and to draw deductions from such classification. That is generally an unsafe mode of reasoning. I shall deal with the language of the claim and the specification as I find them, and apply the principles of law.

The patentee uses the words "combination and arrangement." I shall use the word combination, not in any special sense, but as expressing a union of parts, cooperating to produce one result. Now, that claim would be substantially the same as it is, if it had used merely the

latter part,—if it had said: "I claim the forming of the seam by a combination and arrangement of parts, as hereinbefore described." Of what parts? The parts necessary for the accomplishment of the end. It specifies some of those parts in the beginning of the summing up, namely, the needle carrying its thread through the cloth; the shuttle carrying its thread between the needle and its thread; and then, without any further specification of the parts, says, under a "combination and arrangement of the parts substantially as herein described." It specifies the needle and shuttle, and shows that these are some of the parts to be taken into view in the claim. But suppose that it had omitted that enumeration of parts, and had said, "I claim the forming of the seam, by a combination and arrangement of parts substantially as herein described?" When we look at the previous description, we see that the needle and its thread, and the shuttle and its thread, are a part of the previous description, and; therefore, would be embraced in a general statement that he claims that combination and arrangement of the parts of the machine, substantially as described, used for the purpose of forming the seam.

Looking at it, then, as a claim for the general combination and arrangement of the parts described, what is there in it that is new? I may state, in general terms, that there is a mechanism for forming the stitch; a mechanism for holding the material to be sewed, which we denominate the cloth; and a mechanism for feeding the cloth; and all these general elements in combination and in an arrangement set forth in the specification.

Now, we must look at some of the sub-combinations, as I should term them. And I do this because a great portion of the argument treated the general combination as if composed only of simple elements, whereas, there may be sub-combinations entering into the general combination.

We find, in the first place, the kind of stitch made by Howe, which I shall denominate the interlocking stitch. He uses two threads, and by the mechanism which he describes, he interlocks the threads, forming a loop by carrying the needle and its thread double through the cloth, and then carrying the shuttle and its thread between the needle and its thread through that loop, and thus inter-

locking the threads as the first step towards forming the stitch. Then we find the holding apparatus, consisting of two surfaces fixed against the cloth; these surfaces being one, one side of the shuttle-box, and the other the plate X; the plate X being adjusted according to the thickness of the cloth which is to pass between these two surfaces; and the statement that it is adjusted according to the thickness of the cloth, shows that it is intended to press upon and hold the cloth. These are the holding surfaces, — stationary holding surfaces.

Then there is the feeding apparatus, which carries the cloth along between these two surfaces each successive stitch, so as to make a seam. That feeding apparatus consists, as the patentee describes it, of a piece of metal with points projecting, which are to take hold of the cloth. The power is applied to the metal which has taken hold of the cloth by means of its points, and that metal then, by means of mechanism, carries the cloth with it between the two stationary surfaces. Here is one part of the sub-combination for the feeding, consisting of the plate of metal with points; and the other part consists of the rigid surfaces between which the cloth is passed in feeding, and which aid in keeping it in place while it is fed. That is the sub-combination of the holding surfaces with the feeding mechanism, or the mechanism which moves the cloth. The same holding surfaces also perform another office, — that of aiding in making the stitch. This in two ways: first, they successively resist the thrust and the retraction of the needle. The thread may pass through the material both ways, without moving it by friction. It is held between these two surfaces, which operate to keep it from yielding to the action of the needle in its thrust and its retraction. Besides this, they aid in forming the stitch, by keeping the cloth in the exact line where it is required to be kept when the stitch is tightened, so that the interlocking of the two threads shall be within the body of the cloth, or closely on the side, if desired. The cloth is kept in its position independently of the needle and the shuttle, by these two surfaces, which grasp it and hold it exactly in the line where it should be, and prevent it from being displaced by any agitation or concussion, so that the stitch is sure to be made in the proper place.

These are sub-combinations which enter into the general combination. Now, how far did they exist before Howe's invention? We have, in the first place, three American patents introduced, — Greenough's, Corlis's, and Bean's.

Bean's was the crimping machine; it had a stationary needle, and the cloth was crimped by cog-wheels and forced upon the needle, and when drawn out would exhibit a seam which I call the basting seam, — that is, a thread carried through and along on one side, and then through and along on the other. That machine had very little in common with Howe's. There was a mechanism by which the seam could be formed; but the parts and the combinations were different from Howe's. The stitch was different. The holding surfaces were cog-wheels. The general combination was not Howe's.

The other two, Greenough's and Corlis's, may be classed together. They were both substantially machines by which a stitch was made, called the basting stitch, exactly the stitch that was made by Bean's machine. There were two threads, each of which made precisely the same stitch. It was the stitch made by harness-makers and shoemakers. The material under operation was held in clamps, and a hole was made through it, and the threads were carried through that hole, and the stitch was tightened, and the material was carried forward in the clamps, and another stitch was made. There was no interlocking of the threads; each thread acted independently, and had the same effect as if the other were not used. There being two threads, merely duplicated the effect. That was a different stitch from Howe's. It is not contended that these machines anticipated Howe's; and it is certain that they did not. They are now produced in evidence for the purpose of showing that there was some kind of mechanism existing before Howe's, by which some stitch was made, and that repeated, so as to form a seam, and that thus the three general elements, — namely, some mechanism to form a stitch, some mechanism to hold the material, and some mechanism to move or feed it, — existed before. But the kind of mechanism in the particulars I have stated, and various others, was unlike Howe's.

We come, then, to the other or foreign inventions, that have been introduced as narrowing Howe's. The first is the publication in Brewster's Encyclopedia, which only

comes to this, — that an eye-pointed needle had been described before Howe's invention.

The next in point of time, is the Thimonier, — a French machine, invented in 1830. The first observation to be made upon that, is, that it has no mechanical feed whatever, and therefore lacks one of the general elements of combination that Howe's possessed. And that, of course, is fatal as to its defeating Howe's invention; for it did not contain that essential part of Howe's invention. It was fed merely by hand. How far it contained certain other portions of Howe's, it is impossible to say with certainty, from the means that are afforded to the Court. We have a translation of the specification, but we have nothing else as evidence. There is a model produced, not authenticated, and used only as an illustration, as counsel might illustrate by anything else which they should present to the Court; but it is not proved by any expert, mechanician, or otherwise, to truly represent the Thimonier machine described. We have really nothing but the specification. It appears that there were holding surfaces in that machine, which resisted the thrust and retraction of the needle, and upon one of which the cloth was fed by hand. Therefore, it had two holding surfaces performing the office of resisting the thrust and retraction of the needle, and was so far like Howe's; although it is said that the surfaces were very different, one called the foot or nipple, being a mere cylinder surrounding the needle, and chamfered down to an edge where it comes down upon the material; but still it seems to have been designed to hold the material down upon the table when the needle, as it is called, — crochet hook, in fact, — rises up with the loop of thread through the cloth. Whether or not it held the cloth in place, while the stitch was tightened, has not been satisfactorily shown; nor is it material to the result at which I shall arrive, whether it did or not.

The stitch formed in that machine — I call it a stitch because it has been termed so — was different from Howe's; one thread only was used; there was no interlocking of two threads; the thread in loop was brought up through the material, which was laid horizontally upon a table, and then another loop was passed through that loop, and the first drawn close; the first loop being so placed that the second thrust of the needle would pass through it, and so

successively. This was the loop stitch, sometimes called the chain stitch, being a succession of loops passed one through the other, by a single thread, so that by taking hold of the end of the thread, the whole may be pulled out with facility. We have not, therefore, Howe's interlocked stitch by means of two threads, nor have we his feeding mechanism in the Thimonier machine.

The next introduced is the English patent of Newton & Archbold, of 1841. That is a patent for ornamenting gloves. The sole purpose for which it was made and used was to put loops of thread upon the backs of gloves as an ornament. The material was held in clamps and moved with them: and in one modification there was a bent wire pressing upon the fabric against the thrust of the needles, but with no holding surface opposite the wire. A single thread was used, and if it may be said to make a stitch, it was the same as I have already described as made by the Thimonier machine. It had not two threads interlocked. It had not the stationary holding surfaces, with feeding mechanism carrying the material between them as in Howe's. That machine does not anticipate Howe's invention. Experts differ upon the question whether that was a sewing-machine. It is insisted by one set of experts, that it makes a stitch, and is, in fact, a sewing-machine, though the inventors did not so call it. In order to make a stitch, it is not only necessary that threads should be passed through the material, but the tightening of it is essential; and I do not see evidence that in Newton & Archbold's machine, the thread was tightened, or designed to be, in a manner which would form a stitch, or that the machine possessed the apparatus necessary for that purpose. It was made in 1841. Now, the very gloves upon which it was used for ornamentation, required to be sewed; and yet it does not appear that the inventors, or anybody else that ever used it, thought they could sew with the machine.

When it is said that an old machine existed, applicable to a new use; if this want never existed before, we may readily believe that an old instrumentality may meet it; but when the want has always existed, and not only existed but been pressing, and it is said that an old instrument would always have answered the want, the improbability is so great as to require strong evidence to overcome it. Now, sewing is a universal and pressing want, and has

always been so. Sewing has been needed from the first pair in the garden of Eden, to the last pair that were ever united. And that, in 1841, a man invented a sewing-machine in England, and put it in operation, and did not know it himself; and that all the persons who used it, were in fact using a sewing-machine without knowing it, is hardly credible. I am not satisfied from the evidence, that it can be deemed a sewing-machine, and if it can, it was materially different from Howe's.

We come next to Fisher & Gibbons's machine, letters patent for which were granted in December, 1844, and the specification was enrolled in June, 1845. That machine used two threads, and they interlocked, not exactly in the manner of Howe's; but still there was a mechanism by which one thread was carried by a needle through the material, then another thread was carried by a shuttle between the needle and its thread; and this was repeated in succession. It was not described or denominated as a sewing-machine, but as an improvement in the manufacture of lace. Was that part of Howe's invention, that idea of interlocking the two threads, and the mechanism for carrying that idea into effect, anticipated by Fisher & Gibbons's machine? It clearly had not the other parts of Howe's invention, so as to contain Howe's general combination. It had neither the holding surfaces nor the feeding mechanism of Howe. The material was wound from one roller on to another, passing over two bars, and moved in relation to the ornamenting instruments as required by the ornamental figures to be produced.

But if Fisher & Gibbons's mode of forming the stitch was in fact the same with Howe's, — was it prior, in contemplation of law? This depends upon the construction of our own statute of 1836, chap. 357, sects. 7 and 15.

Howe's invention was completed as early as the middle of May, 1845. His application for a patent was subsequent to June, 1845.

It is contended, that although the patenting abroad may not have been before Howe's invention here, yet, if it was before his application for his patent, it would anticipate Howe's patent.

Now, if the same invention had been made, and the same patent had been granted here, the invention not being before Howe's, it would not have defeated Howe's, because, by our

law, if Howe was the original and first inventor here, and another person had afterwards made the same invention, and, by greater speed, had obtained letters patent before Howe, it would not have precluded Howe from having a patent for his prior invention. And it is extremely improbable, to say the least, that Congress intended to give more effect to an invention and patent abroad, than to an invention and patent here.

Upon looking at the statute, and comparing its different sections, I am satisfied that the patenting abroad must be before the invention here, and not merely before the application. The reasoning of the learned counsel for the complainant upon that point is satisfactory, and I do not think it necessary to repeat it. It is also understood that Judge Ingersoll decided that point, in the case of *Bartholomew* v. *Sawyer*, in New York, in accordance with the views contended for by the complainant's counsel. I hold that the patenting abroad must be before the invention here, in order to defeat the American patent.

But it is contended that this machine was patented abroad prior to the invention here, although the specification of Fisher & Gibbons was not enrolled until after the invention of Howe here. This raises another, and, so far as I am aware, a new question upon the construction of our own statute. The language of the statute is (sect. 7 before cited), "that it had been patented or described in any printed publication in this or any foreign country," — and (sect. 15 before cited) — "had before been patented or described in any printed publication." The language is, "patented in any foreign country." Was this invention of Fisher & Gibbons patented in England before the middle of May, 1845? That depends upon what is to be deemed patenting. What was the patent taken out in December? It was as follows: "Invention of certain improvements in the manufacture of figured or ornamented lace, or net and other fabrics." That was the patent and the whole description; and there is no pretence that it even indicates any invention of a sewing-machine. It is only by virtue of the specification enrolled in June, 1845, that we discover anything as to the stitching mechanism in the machine.

But it is said, that when the specification was enrolled, it took effect from the date of the letters patent, and, therefore, what was specified and enrolled in June afterwards,

was in fact patented in December, 1844. That is the argument. What is the meaning of the word "patented," in our statute? The English government may give such effect to certain acts of their own, as they see fit; they may say letters patent may be granted in general terms, and that the fourteen years they grant may begin at the date of the letters patent, though no specification be enrolled till six months after. That is the law of England, — but the question is, what did the Congress of the United States intend when they used the words, "patented in any foreign country." Did they mean that the invention might be patented before it was made? Because under the English law, the letters patent might be granted before the specification was made, and the specification might contain inventions made after the letters patent were granted. There would be some force in the argument, if, by the English law, nothing could be put into the specification but what was invented or known before the letters patent were granted, — but that was not so. The truth is, that the patentees had these six months by the terms of the letters patent, to enroll their specification, and during all that time they may have made inventions and improvements; and the very thing that is relied upon here as anticipating Howe, for all that we know, may have been invented after the middle of May, 1845, and put into the specification in June following.

What is meant by Congress undoubtedly is, in the first place, that there shall have been an invention; and, in the second place, that it shall have been made patent to the world, — *patented*. Now, we have no satisfactory evidence that the invention was made, and we have positive evidence that it was not made known to the world by being patented until June, 1845; it was not made patent until after the invention by Howe. I am, therefore, of opinion that Fisher & Gibbons's invention, whatever it may have been, was not patented until after Howe's invention, and can have no effect whatever.

Having thus gone through with the prior patents, I next proceed to examine the defendants' machines, and see what there is in them, in common with Howe's, and which is new in Howe's.

In some part of the argument, although it was not distinctly stated, it seemed to have been thought that if all the different parts of Howe's could have been found before, in

different machines, that would anticipate Howe's. That, of course, cannot be maintained, because it is familiar law that a new arrangement, a new combination, may constitute a new invention. If not only all the primary elements, but all the sub-combinations, had existed in different machines before, but never before had been brought together to constitute one machine, and co-operating to produce one result, and Howe had brought them together by invention producing a useful result, he would be entitled to a patent for such combination and arrangement.

We find, then, to look at the Williams machine, in the first place, that it has two holding surfaces, between which the cloth is fed by mechanism,—a piece of metal taking hold of the cloth and carrying it along between these two surfaces. That is the sub-combination of Howe's, so far. And that is one material part of the defendant's machine, and found in no machine prior to Howe's; the presser-foot is divided into two parts, operating alternately, one of which is always upon the cloth, and pressing it down upon the table; one part presses the cloth down upon the roughened feeding-surface below; the feeding is done by advancing the roughened surface, and then withdrawing it in the same plane; one part of the presser-foot being raised, that it may not press the cloth down while the roughened surface is retreating; the other part, in the mean time, being down, holds the cloth in position while the first is up; these opposing surfaces are holding the cloth all the time between them, for the operation of tightening the stitch, and for resisting the thrust and retraction of the needle, and keeping the cloth in place while it is fed along.

We find, in the next place, that it has two threads, and forms the stitch by the interlocking of these two threads; and so far—without speaking of the minor mechanism by which this is accomplished—so far it is like Howe's; and Howe's was not anticipated in that respect by any machine prior to his. These sub-combinations are like Howe's. The general combination and arrangement are like Howe's. It is testified by the experts that they are identical; and I see no reason to doubt that statement.

We find, then, that the Williams machine has adopted the general combination and arrangement of Howe's, and some, at least, of the sub-combinations of Howe's, in which that machine differs from others. Without undertaking, there-

fore, to go into the minutiæ of the mechanism, the Williams machine, in my judgment, contains so much of Howe's sub-combinations, and of his general combination and arrangement, that it is an infringement of his patent.

The Sloat machine, in the first place, differs not substantially or scarcely at all from Howe's, in the holding apparatus. It has two surfaces, the table and the presser-foot. The foot presses on the material which is between that and the table, and which is there fed along by the four-motion-feed, as it is sometimes called, not requiring the presser-foot to rise to enable the roughened surface to return. And the same remark applies here as to the Williams machine, that it has these surfaces holding the material for the same operations—the tightening of the stitch—resisting the thrust and retraction of the needle, and keeping the cloth in its proper place when it is fed.

As regards the formation of the stitch, the Sloat machine also uses two threads and makes the interlocking stitch. The shuttle is not carried between the needle and its thread, but the thread of the needle is carried around the shuttle, thus producing the interlocking—the stitch being substantially the same as Howe's, and produced by these instruments—the needle and the shuttle having each its thread, one carried through the loop of the other, in the manner I have described.

It is my opinion that the Sloat machine also contains so much of Howe's sub-combinations or subordinate parts, and of his general combination and arrangement, that it is an infringement of his patent.

There are other parts of these machines, minor and subordinate, which have been elaborately discussed, upon which I do not deem it necessary to express an opinion. The considerations I have stated are satisfactory to my own mind, without going further.

There are two other machines admitted to have been sold by the defendants, Morton & Dermot, the Gibbs machine and the Johnson machine. The complainant has introduced no evidence to the court that these are similar to his. The Johnson and Gibbs machines have been produced by the defendants for the inspection of the court. The only evidence is the machines themselves. That might be satisfactory in some cases; but I do not think that upon a motion for a preliminary injunction I should undertake to

decide the question of infringement upon my own inspection merely of such minute mechanism, even if I had better optics than I have; not being a mechanician, I might fall into mistakes. I do not therefore decide that either of these machines infringes. I decline to do so from the want of any evidence upon the subject, except the machines themselves.

It will be observed by the counsel that the conclusions to which I have come have been thus far independent of any allusion to the trial in England. I think, however, I ought not to close without referring to the case of *Thomas* v. *Foxwell*, because that trial was upon this very invention, before the Court of Queen's Bench, under Lord Campbell, then Chief Justice of England, and the conclusion I have reached is confirmed and sanctioned by the instructions given to the jury, and by the verdict in that case. The first claim there was very similar in effect to the claim here. The claim there was for the general arrangement of the machinery described, which produced the result of sewing a seam. Here it is a claim for the combination and arrangement of the parts described, (naming some of them,) which co-operate to form the seam. The court instructed the jury there, that if the defendants used a substantial part of the plaintiffs' combination, which was new, it was an infringement; and this instruction was subsequently revised and sanctioned by the whole court. I have not thought it necessary to determine whether our law goes to that extent.

But it may be asked, was the infringing machine there like the machines of the defendants here? It has been proved that it was the Grover & Baker machine that was sued in the case of *Thomas* v. *Foxwell*, by the testimony of Baker of the Grover & Baker Sewing Machine Company, who was in England, and aided in the defence of that suit, and of Wilson, the Englishman, who also aided in that defence.

That the Williams machine is like the Grover & Baker machine, is testified by Wetherell, the superintendent of the Grover & Baker Sewing Machine Company's manufactory. This affidavit is wholly uncontradicted. Williams, the defendant, was himself six or seven years in Grover & Baker's employment, making their machines, and must know whether his own is similar to theirs, yet he has produced no evidence to impair the force of Wetherell's testimony. The decision

in England, therefore, was upon a machine like the Williams machine, and is pertinent to the present inquiry.

There is one other ground of defence, namely, acquiescence. As I shall make no order in relation to the Johnson and Gibbs machines, the question of acquiescence applies only to the Williams and the Sloat machines. No one of the affidavits says there has been any acquiescence as to either of those machines. The affiants only say, that there has been some sort of machines making some stitch, which they describe, and they never heard that Mr. Howe claimed that it was his. To affect the rights of the complainant by acquiescence, it should at least be shown what that is in which he has acquiesced. There is direct evidence that he has not acquiesced in any adverse use of the Grover & Baker machine; and that Grover & Baker have paid him large sums for the right to manufacture.

The remaining question is, what order should be made? Under the circumstances, I shall not make an order for injunctions, provided the defendants will give bonds to keep an account and pay over. Howe's patent will expire on the 10th of September next. It may or may not be extended. It is stated that Williams has an establishment in which he is making these machines. If all the rights of Howe can be protected, and indemnity can be secured to him without stopping this manufacture between the present time and the 10th of September, I think the court ought to give him and the manufacturers of the Sloat machine the benefit of the contingency, that at that time they may be allowed to go on without a permission from Howe, if his patent should not be extended. And I suppose that such protection and indemnity can be secured to Howe by defendants giving a bond with sureties to account and pay to Howe such amount as the court shall finally order. Howe is not himself a manufacturer; he sells the right to others to make his machine; and there can be little difficulty in determining what will be an indemnity to him for the use of his patented invention in the manufacture of machines by the defendants. I am inclined to this course, too, because the machines of the defendants are supposed to embrace improvements upon Howe's, which could not be used without also using the original upon which they are ingrafted. These improvements may greatly increase the utility of the machine. The court will not unnecessarily prohibit a party from using his

improvements. If the defendants will give security to account and pay to the complainant such sum as the court shall decree, injunctions will not issue.

Mr. Giles: I suppose injunctions will issue if sureties are not given.

The Court: Yes, that is understood, of course.

Mr. Washburn: What course is to be pursued?

The Court: The counsel for the parties will confer as to the bond, and amount, and sureties; and if they differ, they may appeal to the court.

Supreme Judicial Court for the Commonwealth of Massachusetts.

SAMUEL S. FOSS *v.* AARON P. RICHARDSON ET AL.

Evidence — Written contract cannot be explained by parol.

A, by deed, sold and conveyed to B a patent right for an elastic horseshoe. At the time the bargain was made, A exhibited to B a particular kind of horseshoe, and represented that that was the kind of horseshoe which the specifications of the patent described; but this kind of horseshoe was not included in the patent. B accepted the deed, retained it, acted under it, and made payments on account of it. In an action for money had and received by B afterwards brought against A, to recover back the amount paid under the deed, it was *held*, that, in the absence of fraud or warranty, B could not recover back the consideration paid, merely because there had been a misunderstanding as to the meaning of the deed, or of the extent of the rights which it conferred, without a violation of the rule which forbids the controlling of a written contract by parol evidence.

This was an action of contract, brought by the plaintiff to recover of the defendants the sum of fifteen hundred dollars, paid by the plaintiff to the defendants, in the spring and summer of 1854, as a part of the purchase money for, and in consideration of the sale and conveyance by the defendants to the plaintiff, of Jones's patent right for an elastic horseshoe, for a certain territory. At the trial before the jury, the plaintiff introduced evidence tending to show that the horseshoe, shown and exhibited to him by the defendants, at the time of the sale, as and for the shoe covered and secured by the patent of said Jones, was not in fact the shoe described in the said Jones's specification

of claim; that no exclusive right was secured to the said Jones in the shoe so shown and exhibited to the plaintiff; that neither the shoe shown to the plaintiff nor the shoe secured to said Jones by his letters patent, had any real value or utility whatsoever; that he had manufactured and sold several shoes like the one shown him by the defendants at the time of the sale to him of said patent right, and received pay for the same; and that in 1854, prior to the last payment by him to the defendants, he proposed to the agent of the defendants who made the sale to the plaintiff, to give up the trade, but that said agent declined to do so.

The defendants, to support the issue on their part, introduced evidence tending to show that the shoe shown and exhibited to the plaintiff at the time of the sale, was in fact the shoe covered by said Jones's patent, and that the same was a valuable right, and a new and useful invention; that the patent had several years to run at the time of the trial; and that if the said shoe shown and exhibited by them to the plaintiff at the time of the sale, was not covered by the said Jones's patent, they acted in good faith and without fraud, believing that it was covered and secured by said patent; and that the plaintiff had the same and equal opportunity with the defendants to judge of that matter.

The defendants requested the judge to instruct the jury, that this action could not be maintained, unless the plaintiff proved a warranty or fraud; that the contract must be rescinded and a demand made of defendants for the money; that if the jury should find that the patent was worthless, still a demand must be made of defendants for the money paid by plaintiff to them; that the plaintiff cannot retain the deed of the patent, and recover his money back; that, if plaintiff has derived a benefit from the patent by use or sale of rights, he cannot recover; that if the specification in the letters patent did not accurately describe the shoe sold, that would not lay the foundation of a recovery in this action; that if the shoe sold was not the one described in the patent, although there was a mutual mistake between the parties, the action could not be maintained, without proof of fraud or warranty, even if the shoe were worthless, and no rescission necessary.

The court instructed the jury, among other things, that if the invention was not new and useful, the patent would

be void; and if void, notwithstanding the covenants in the deed, the plaintiff, without proving fraud, might rescind the contract, and recover the money back under the count for money had and received; but that the contract must be rescinded in the manner hereinafter mentioned, in case of fraud, or the steps necessary to rescind must have been waived by the other party; that if the jury found the invention covered the shoe exhibited, they would inquire if it was useful; *i. e.* could be applied to some beneficial use; if it could be used in certain cases advantageously, as in diseases of the feet or limbs of horses, relieving or curing lamenesses, tender feet, contracted hoofs, and the like, it might be called useful in the sense of the law, though not profitable to the owner or inventor, — useful in contradistinction to hurtful or pernicious; that if it was not fit for the use intended, and not within the inducement to the purchase, the contract might be rescinded; that, on this state of facts, the plaintiff should have requested or demanded back the money before suit; that if they found the shoe exhibited and sold as patented, was not within the patent, and both parties honestly believed it to be, the same principles would apply, as to a recovery back of the money paid. It would then be the sale of an unpatented article. There would have been no exclusive right to make the split shoe, or the shoe sold. Any one could manufacture it. The right to make it would be of no value. If this was the character of the sale, and the money was thus paid, it might be recovered back by a rescission of the contract, and this would be true and the rule for the trial, even if the shoe exhibited was useful.

The jury found for the plaintiff, for the sum claimed. They also found specially that the shoe exhibited and sold by the defendants to the plaintiff was not covered by the Jones patent.

Samuel Wells, for defendants, argued in support of the exceptions.

1. The instruction requested "that if the plaintiff had derived any benefit from the patent, by use or sale of rights, he cannot recover," should have been given. Phillips on Patents, 346 and following pages. *Taylor* v. *Hare*, 4 *New Reports*, 260. *Hunt* v. *Silk*, 5 East, 449. *Perley* v. *Balch* 23 Pick. 283. 2 Parsons on Con. 191, and note *O*, where the authorities are collected.

2. The instruction requested, "that if the specification in the letters patent did not accurately describe the shoe sold, that would not lay the foundation of a recovery in this action," should have been given. Act of Cong., July 4, 1836, chap. 357, § 13, and March 2, 1837, chap. 45, 7. (5 U. S. Stat. at Large, 122, 193.) New specifications may be made, and new patents granted, and a description of a new improvement may be added to the original specification. Curtis on Patents, 616. Inaccurate use of words or terms of art will not vitiate a specification, provided persons of ordinary skill or knowledge would not be misled. The shoe sold was in principle the same as the shoe described in the specification.

3. The instruction requested "that if the shoe sold was not the one described in the patent, although there was a mutual mistake between the parties, the action could not be maintained without proof of fraud or warranty, even if the shoe were worthless, and no rescission necessary," should have been given, and the second instruction in the bill of exceptions should not have been given. *Chandlor* v. *Lopus*, Croke James 4. *Seixas* v. *Woods*, 2 Caines, 48. *Bradford* v. *Manly*, 13 Mass. 139. *Sprigwell* v. *Allen*, Aleyn, 91, in note to *Williamson* v. *Allison*, 2 East, 446, and *vide* therein note of case of *Dowding* v. *Mortimer*. *Parkinson* v. *Lee*, 2 East, 314, and note to same. *Swett* v. *Colgate*, 20 Johns. 201. *Welsh* v. *Carter*, 1 Wend. 185. *Oneida Manufacturing Society* v. *Lawrence*, 4 Cowen, 440. *Snell* v. *Moses*, 1 Johns. 96. *Emerson* v. *Brigham*, 10 Mass. 197. *Salem India Rubber Co.* v. *Adams*, 23 Pick. 257. *Stone* v. *Denny*, 4 Met. 151. *Hall* v. *Condor et al.*, 20 Common Bench, 20. 1 Story's Equity, § 149.

4. The instruction requested, that a demand should have been made of defendants for the money, should have been given. Com. Dig. Title Pleader, C. 73.

The jury found their verdict under this instruction, to wit: that if by mistake a patent right were sold to make shoes, which (though useful) were unpatented, the same steps might be taken by the purchaser to rescind the contract, and when taken, (or waived,) this action would lie. The exception is, that the jury were not instructed that a warranty by the defendant must be proved. But a warranty was proved, for every sale of personal property implies a warranty of title. 1 Smith's Leading Cases, [5th Am. ed.]

242. *Defreeze* v. *Trumper*, 1 Johns. 274. *Coolidge* v. *Brigham*, 1 Met. 551. See also *Henshaw* v. *Robbins*, 9 Met. 86. And warranty of title includes a warranty of the existence of the thing to which title is to be made.

The jury, by finding that the patent conveyed did not cover the shoe exhibited, (and no other patent was alleged to cover it,) found that the patent of the shoe exhibited did not exist, and thus found a breach of the warranty.

But the action will lie without proof of warranty, because the article intended by both parties to be given in exchange for the money, (viz. a patent right in the shoe exhibited and sold,) never had an existence, and, therefore, there could be no contract of sale. 2 Kent's Comm. 468. *Hitchcock* v. *Giddings*, 4 Price, 135.

If the contract had existed, there was a substantial error concerning its subject matter, which destroys the consent requisite to its validity. 2 Kent's Comm. 468, 471, 476. *Allen* v. *Hammond*, 11 Peters, 63.

And there was a total failure of consideration, for which the contract might be rescinded, and this action sustained. 1 Parsons on Contracts, 386. *Woodward* v. *Cowing*, 13 Mass. 216.

Hoar, J. — Upon a careful examination of the bill of exceptions in this case, although the law, as stated by the learned judge who presided at the trial, was an accurate statement of general legal principles, we are apprehensive that the question upon which the legal rights of the parties must depend, has not been submitted to the jury. From an apparent inconsistency between some of the recitals in the bill of exceptions and the pleadings in the case, and from the fact that the counsel for the plaintiff at the argument before us, puts his case upon grounds upon which no instructions seem to have been asked or given at the trial, we think that the real matter in issue cannot have been determined, and that a new trial must be directed.

The action is for money had and received by the defendants to the plaintiff's use; the account annexed is for various sums of money paid by the plaintiff to the defendants, in the spring and summer of 1854. The facts upon which the plaintiff seeks to recover back the money thus paid, do not appear from the amended declaration. But in the bill of exceptions it is said to have been money "paid as a part of the purchase money for, and in consideration of the sale and

conveyance by the defendants to the plaintiff of Jones's patent right for an elastic horseshoe." The evidence showed that by a deed dated May 4, 1854, the defendants conveyed to the plaintiff Jones's patent right for an elastic horseshoe, for the territory agreed on, and the jury have not been required to find that this was a void patent, or worthless. But there was evidence to show, and it seems to have been conceded, that the defendants exhibited to the plaintiff a particular kind of horseshoe, which the jury have found not to be included in Jones's patent, and which does not appear to have been patented, and represented that that was the kind of horseshoe which the specifications of the patent described.

Upon this precise statement of the case, we think it clear that the plaintiff could not maintain the action, in the absence of fraud or warranty; and that the jury should have been so instructed. The contract was in writing. It purported to convey, and did convey, for a consideration named, a certain interest in Jones's patent, which was a thing in itself a matter of record. It would not be competent to show by parol that it conveyed, or was intended to convey, anything else; or that Jones's patent embraced, in the contemplation of the parties, any other invention or article than that which it did in fact include and describe. If the money was paid for a share in Jones's patent, which was of no value, and the contract in writing was for the conveyance of such share, and the plaintiff received such share, there was no failure of consideration. The previous conversation of the parties was merged in the writing.

But the plaintiff now contends that the only contract between the parties was for the purchase of a patent right to make the kind of horseshoe exhibited to him; that having agreed upon a price, which he afterwards paid, the defendant, instead of delivering to him what he had purchased, delivered a deed of Jones's patent, which was a different thing, which he had not purchased, and which he has never accepted; and that there is no such patent as that which the defendant agreed to sell him. This would make a case for the plaintiff. It does not, however, seem to be the case contemplated in the instructions of the court, or established by the verdict of the jury. Whether it can be made out, upon the facts reported, on another trial, with proper instructions as to the law, may admit of

serious doubt. It is undoubtedly true that if a man purchases and pays for one article, and another is sent to him by the vendor, he may refuse to receive it, and demand and recover back the money which he has paid. If the plaintiff had contracted for the purchase of a piece of land, and a deed of a different piece of land were sent to him, he need not receive it. But if he did receive it, and the deed took effect by a complete delivery, which of course includes an acceptance, he could not recover back the consideration paid, by showing that both parties understood the deed to have a different operation and effect from that which really belonged to it. So in the case at bar, if the plaintiff took the deed of the patent right, not merely for the purpose of examination, but as a deed, vesting the property in him, and, having read it or having opportunity to read it, retained it, acted under it, and made payments on account of it, we cannot see how it would be possible for him to recover back the consideration for which the deed stipulated, merely because there had been a misunderstanding as to the meaning of the deed, or of the extent of the rights which it conferred, (no fraud being proved,) without a violation of the rule which forbids the controlling of a written contract by parol evidence.

Exceptions sustained, and a new trial granted.

Samuel H. Gookin *vs.* New England Mutual Marine Insurance Company.

Insurance—Time Policy—"At Sea."

In an action on a policy of insurance on a ship for one year "commencing the risk on the 27th day of May, 1854, at noon; if at sea on the expiration of the year, risk to continue at *pro rata* premium until her arrival at port of destination," *held*, that the proper construction of the policy is that if the vessel was, at the expiration of the year, in any port, or if then at sea, whenever she should return into port, although it was an intermediate port to which she had resorted for the purposes of the voyage, the conditional extension of the time beyond one year ceased to have any further effect, and the policy would not cover losses occurring subsequently; nor could the vessel be considered at sea at all times until her return to her home port.

Ypala on the western coast of Mexico held upon the proof to be a "port" within the policy.

The ship insured under the above policy sailed for San Blas and there obtained a license to take in a cargo of Brazil wood at Ypala, where she arrived eight days before the expiration of the year, and where she

continued several days subsequent to that period, taking in her cargo, and while there, and after the expiration of the year, was lost. *Held*, that the ship was not "at sea" at the expiration of the year, and that the insurers were therefore not liable under their policies.

This action was submitted to the court upon an agreed statement of facts, with authority for the court to draw any inferences of fact, which a jury might draw from the testimony, and under an agreement that if the action could be maintained, the plaintiff should have judgment as for a total loss; otherwise, that judgment was to be entered for the defendants. That part of the agreed statement which is material to the point decided by the court is given below.

The action, commenced February 19, 1856, was brought on a policy of insurance on the clipper ship Water Witch, of which the plaintiff owned one eighth. By the policy, which was dated May 27, 1854, the defendants caused the plaintiff, for whom it might concern, payable to the plaintiff, to be insured, lost or not lost, $8,750, on the ship Water Witch for the term of one year, commencing the risk May 27, 1854, at noon; if at sea on the expiration of the year, risk to continue at *pro rata* premium until her arrival at the port of destination: with the usual agreements as to the value of the ship and rate of premium, &c.

On the 23d of April, 1855, the Water Witch was at San Francisco, California, and her captain chartered her for a voyage "from San Francisco to the port of San Blas, in Mexico, there to pay her tonnage duties, and getting a license to load Brazil-wood at Ypala, to proceed to the latter port or place, there to take a full cargo of Brazil-wood and proceed direct to New York or Boston, at the option of Don Juan Jose Castanos." Castanos was the agent of the charterers, and the person to whom the ship was consigned at San Blas.

The ship left San Francisco, May 1, 1855, being seaworthy in every respect, and arrived at San Blas on the 9th of the same month. Here the captain entered and cleared her, and paid her port charges for the port of New York or Boston, leaving a certificate of privilege to stop at Ypala for a cargo of Brazil-wood. The ship left San Blas May 16; arrived at Ypala May 19; commenced taking in cargo on the 21st, and proceeded in loading until about May 30. On the night of the 31st it commenced blowing

heavily, the wind blowing directly on shore. On the 1st of June the wind and sea increased, with violent squalls, and the ship commenced dragging both anchors towards the shore. Her masts were cut away, but in spite of all efforts she was thrown upon the rocks, and became a wreck, the crew saving themselves by a line from the ship to the shore. All the necessary steps were taken by the master in the matter of the protest, &c.

The district of Ypala is off the western coast of Mexico between San Blas which is northwest of it, and Acapulco which is southeast of it. San Blas, Altata, Mazatlan, and Acapulco are the only ports of entry and clearance on the whole coast, and that part of the coast where Ypala is situated lies open to the sea.

Ypala is eighty miles southward of San Blas, and is related to San Blas and the other ports of entry in this wise, to wit: that vessels cannot go to Ypala without going to San Blas or some other port of entry, because they are obliged to go to one of these ports of entry to enter and clear, pay their port charges, and get a license to go to Ypala for Brazil-wood, the receiving of which by the vessels there is the only trade of the place. Vessels lie off there for this wood, and occasionally purchase a few supplies from the natives, but do not go there for the purpose of unloading any cargo.

The village or settlement of Ypala,—the whole country round being known by the name of Ypala,—is composed of two houses, with forty or fifty huts inhabited by one or two hundred Indians, who load the Brazil-wood in canoes which they launch through the surf on the beach, when a smooth opportunity offers, and paddle to a launch which lies just outside of the ship, from which it is received on board. A ship receiving Brazil-wood lies about a quarter of a mile from the shore, which is entirely open to the sea, and is a beach shore patched with rocks in some places; and where the Water Witch went ashore it was rocky. There is no haven or harbor at Ypala, of any kind, nor any lighthouse or breakwater or anything of the kind, neither is there any lighthouse or custom-house of any kind, nor any American consul or agent of any kind resident there. All entries and clearances, and in fact all the ship's custom-house business are made or done at San Blas, Altata, Mazatlan, or Acapulco; principally at San Blas. The whole country round about is the private property of a single individual.

In the license that was granted to the Water Witch, Ypala was described as a "port or place," and in other licenses it had been described in the same manner.

This case was heard, together with the case of *S. Tilton et al.* v. *Tremont Mutual Insurance Company.*

Rufus Choate, B. R. Curtis, Sidney Bartlett, and *Hinds and Tilton* were counsel for the plaintiffs, and *Chas. G. Loring, Richard Fletcher, John H. Clifford,* and *Sewell and Angell* for the defendants.

The counsel for the plaintiffs in their brief submitted the following points and authorities.

I. On the expiration of the year, May 27, 1855, the Waterwitch was at sea, in the contemplation of the policy. *Wood* v. *New England Ins. Co.*, 14 Mass. 31, *Bowen* v. *Hope Ins. Co.*, 20 Pick. 275, and see *Union Co.* v. *Tyson*, 3 *Hill*, 118.

She was still in a state of peril on account of the peculiar character of the *locus* Ypala. She was engaged in a voyage which had been commenced within the time of the original risk, and simply stopping on the way at Ypala, in prosecution of that voyage, having cleared at San Blas for the port of New York or Boston, her port of destination.

II. A ship's port of destination means not her port of arrival merely, but where, in pursuance of the original intention of the parties to the policy, it was intended her cargo should be delivered. Arnold on Ins., ed. 1850, pp. 462, 463. *Coolidge* v. *Gray*, 8 Mass. 529.

(1.) Where a ship is insured generally to her port of destination, it means where she breaks bulk for the purpose of unlading her cargo, *i. e.* her place of final and ultimate destination. *King* v. *Middleton Ins. Co.*, 1 Conn. 184.

(2.) And so as to discharging crew. *King* v. *Hartford Ins. Co.*, 1 Conn. 339.

(3.) The port of destination of the Water Witch was New York or Boston, according to the terms of the charter party, and she had a right to stop at Ypala for the beneficial purposes of her voyage. *Coolidge* v. *Gray*, 8 Mass. 529, *Union Co.* v. *Tyson*, 3 Hill, 118.

Destination means where a ship *ends* her voyage. Bouvier's Law Dic. vol. 1, p. 415. A ship 'on a passage' is "at sea." By Shaw, Ch. J. in *Bowen* v. *Hope Ins. Co.*, 20 Pick. 279.

III. Ypala is neither a port of entry nor a port in any legal sense. And the words "at sea," in the policy, are used in contradistinction to arrival in *port*. See language of Shaw Ch. J. in *Bowen* v. *Hope Ins. Co.*, 20 Pick. 278.

(1.) In port, in case at bar, means, at least, arrival at a place *of safety*, if not at a *home* port in the United States. See language of Parker, Ch. J. in *Wood* v. *N. E. Ins. Co.*, 14 Mass. 31.

(2.) A port is a place to which the officers of the custom are appropriated. 1 Chitty on Commerce and Manufacture, 726. Bouvier's Law Dic. Title Port, vol. 2, p. 350.

(3.) And a place where goods are imported. *Locus conclusus quo importantur merces et unde exportantur.* Roman Law.

(4.) And a haven and something more. And a harbor, *i. e.* a place of safety for ships. 2 Chitty on Commerce and Manuf. vol. 2, p. 2. "A port, saith my Lord Hale, is *quid aggregatum*, consisting of something that is natural, viz. an access of the sea whereby ships may conveniently come,—safe situation against winds where they may safely lie, and a good shore where they may well unlade; something that is artificial, as keys, and wharves, and cranes, and warehouses, and houses of common receipt, and something that is civil." Bacon's Abridg't. Prerogative B. p. 25, vol. 8.

IV. The cases *American Insurance Co.* v. *Hutton*, 24 Wend. 330, and *Hutton* v. *American Ins. Co.*, 7 Hill, 321, are distinguishable from the case at bar. (1.) Because St. Thomas is a port of safety. (2.) Communication therefrom is easy. (3.) Because plaintiff, at the expiration of the year, knew his ship was at St. Thomas, and could have so informed any underwriter. (4.) The facts therein generally differ from those of the case at bar. If any language therein seems to differ from the language of the courts of Massachusetts an intention so to differ is expressly disclaimed by the court, and, without such disclaimer, they would not be law.

DEWEY, J. — This is an action brought on a policy of insurance, by which the defendants insured the plaintiff $8,750, on the ship Water-Witch, for one year, "commencing the risk on the 27th day of May, 1854, at noon; if at sea on the expiration of the year, risk to continue at *pro rata* premium until her arrival at port of destination."

The ship being at San Francisco, in California, was chartered by the captain from thence to the port of San Blas, in Mexico, and there "getting a license to load Brazil wood at Ypala, to proceed to the latter port or place, there to take a full cargo of Brazil wood, and proceed direct to New York or Boston."

The vessel under this charter went to San Blas, got there the license to take in the cargo of Brazil wood at Ypala, sailed from thence for Ypala, where she arrived May 19, 1855, commenced taking in her cargo there on the 21st, proceeded in loading till about the 30th, and was totally lost by being driven on the rocks at Ypala, on the 1st of June, the year for which she was insured having expired on the 27th of May.

By the charter-party, New York or Boston was the ultimate port, and San Blas and Ypala intermediate ports of destination.

The question is, whether this policy was in force on the 1st day of June, 1855. It is contended, on the part of the plaintiff, that the conditional extension of time covers the vessel during the entire round voyage, to her return to Boston, and that she would be "at sea" until her arrival at such final port, no matter how many intermediate voyages from port to port she might have made after the expiration of the year. On the other hand, on the part of the defendants, it is insisted that if the vessel was, at the expiration of the year, in any port, or if then at sea, whenever she should return into port, although it was an intermediate port to which she had resorted for any purposes of the voyage, the conditional extension of the time beyond one year was of no further effect. The general character of this policy would seem to be that of a time policy. As such it has the privilege of greater latitude in the voyage, and freedom of risk from loss of insurance by deviation or change of purpose as to the particular ports to be visited. But with these benefits there comes, also, the inconvenience of the limitation of time stated in the policy, which may expire before the contemplated round voyage has been fully accomplished. The distinction between the two classes of policies, those on time and those for a round voyage, are well recognized, and may, perhaps, throw some light upon the inquiry, whether this policy was to continue until the whole voyage was completed, and the vessel moored

in safety on her final return to her home port in the United States. As an original question, the proper view to be taken of this policy, as it seems to us, would be to consider it as a time policy, intended by the parties to continue one year, and then to expire wherever the vessel might be at the expiration of that time, if then in port anywhere, and that the stipulation to continue longer than a year, if then at sea, must naturally be taken to be a provision of a limited and temporary character, defeasible on her return to a port, and not one that would give the policy the indefinite duration attaching to a policy for a round voyage.

The plaintiff relies upon the case of *Wood* v. *New England Marine Insurance Company*, 14 Mass. 31, as decisive of the present case. The broad doctrine is stated in the opinion of the court delivered in that case, "that a vessel is 'at sea' within the meaning of that clause in the policy, while on her voyage, and pursuing the business of it, although, during a part of the time, she is necessarily within some port in the prosecution of her voyage."

To this case as an authority, it is objected, however, that the facts thereof well authorized the plaintiff to maintain his action independent of any such doctrine as was stated in the opinion of the court, and now relied on as an authoritative adjudication of the present question. Its value as an authority for the present case must depend very much upon the precise question there presented, and necessarily arising upon the facts.

The policy in that case was for twelve calendar months, from 24th December, 1806, with a memorandum at the foot of the same, "should the vessel be at sea at the expiration of the above period, the risk is to continue until her arrival at a port of discharge." The question which seems to have received the more full consideration of the court, was that as to the liability of underwriters for a loss arising from an alleged violation of the Milan decree. It appeared that the vessel was in the port of Bristol from 25th December, 1807, to the 20th January, 1808, having been captured by a British private armed ship, and carried there by her captors, under pretence that she was bound to an enemy's port. The vessel proceeded to sea, from Bristol, 20th January, 1808, and was subsequently captured by a French privateer. The court held, that the clause of the policy "should the vessel be at sea at the expiration of the

year, the risk is to be continued until her arrival at a port of discharge," continued the policy, though the vessel was, at the expiration of the year, in the port of Bristol, being brought there by a private armed ship against the will of the master, so that a loss having occurred on her voyage from Bristol to Amsterdam, her original port of destination and discharge, the insurers were liable. The case presented this peculiar feature, that does not exist in the present case, that the vessel was by an armed force carried into port, against the will of the master. The only port to which she had arrived, and which could be said to have taken her case out of the condition of a "vessel at sea," was this port of Bristol, to which she was wrongfully carried by superior force. But the extension in case she was at sea, was to continue "until her arrival at a port of discharge," and Bristol was not her port of discharge. It was Amsterdam, and she was lost by one of the perils insured against, before reaching Amsterdam. The case was, therefore, one directly falling within the condition of being "at sea," on her direct voyage from Beverly, her place of departure, and if her putting in and stay at Bristol was by reason of its being by an armed force and against her will, to be considered as the termination of the voyage, or arrival at a port of discharge, the plaintiff might well be entitled to recover on his policy. No such question arose, as whether, under that policy, the underwriters would have been liable for a loss occurring on a return voyage from Amsterdam, commenced after the expiration of the year. The vessel never reached Amsterdam, her first and intermediate port of destination. The only point, therefore, required to be decided in that case, was whether the vessel not having reached Amsterdam within the year, and having been in a port only as carried there by force by a British private armed vessel, was within the meaning of the policy, "at sea," at the expiration of the year. Assuming the putting in and stay at Bristol to be an act for which the assured was not responsible, and one not affecting the policy, the case was clearly for the plaintiff as to the duration of the risk, and this without deciding the further question now raised.

Upon the more general question, the subject of the present inquiry, no authorities were cited. Indeed, the ground taken by the plaintiff's counsel would seem to have been

merely that while under this illegal seizure and detention, and the consummation of her voyage to Amsterdam having been thereby prevented, such detention and carrying into a port would not be an arrival at a port of discharge within the contemplation of the parties to the policy. The cases cited by the counsel on that hearing, of *Scott* v. *Thompson*, 4 B. & P. and *Robinson* v. *Marine Insurance Co.*, 2 Johns. 89, were only to that point. No authority, it is believed, could then or can now be found to support the broad proposition contended for by the plaintiff, unless it be the case of *Wood* v. *New England Marine Insurance Co.*, 14 Mass. 31. We look in vain for any English cases bearing upon the subject. Our own case of *Bowen* v. *Hope Insurance Co.*, 20 Pick. 275, furnishes no authority for this doctrine. The case of *Wood* v. *New England Marine Insurance Co.* was referred to in the opinion pronounced in that case, but merely as a case where it had been decided that a vessel might be deemed "at sea" while on a foreign voyage, though the vessel had been captured and detained in a foreign port, and it was so detained until after the expiration of the year, and her voyage to her port of destination and discharge delayed thereby, and upon resuming her voyage after the year, she might be considered as entitled to all the privileges of "being at sea" during her illegal detention. The case of *Bowen* v. *Hope Insurance Co.* was this: an insurance was effected to the amount of $5,000 on the brig "at and from Boston, to and at all ports and places to which she might proceed for one year, from 6th October, 1834, and if the vessel should be at sea when the year expired, then the risk was to continue until her arrival at her port of destination and discharge." The vessel, on the 22d day of June, 1835, sailed for Rotterdam, from which place she was to proceed to Bangor, in Wales, for a cargo of slates, and thence to Boston; and on her return passage from Bangor to Boston, she sustained damage by perils of the seas, for which the action was brought. The defence was, that the vessel was at Bangor at the expiration of the year. It was conceded that she was there and in prosecution of her voyage, and with the intention of proceeding on the same. On 25th September, 1835, she had dropped down several miles below Bangor, but was detained by headwinds and came to anchor, and did not actually get to sea until the 8th October, two days after the year expired.

The question argued and decided was, whether the vessel had sailed or commenced her voyage from Bangor previous to 8th October, and the court held, enough was done to put the vessel "at sea" within the terms of the policy, before the expiration of the year. This question was directly considered by the Supreme Court of New York, and subsequently by the Court of Errors, in the case of *Hutton* v. *American Insurance Co.* reported in 24 Wendell, 330, and 7 Hill, 321. It was a suit upon a time policy on the brig Champion, for twelve calendar months, commencing 21st January, 1835, and "if at sea at the expiration of the term, the risk to continue at the same rate of premium until her arrival at the port of destination." She sailed from New York, intending to proceed to St. Barts and Curaçoa, and then return to the United States. After landing at those places, she went to St. Thomas for the purpose of taking in her cargo, where she arrived 6th January, 1836, and remained there until 22d January, being necessarily detained during that time for repairs. She then commenced taking in a cargo, and sailed from thence for New York on 30th January, but was stranded and left on the voyage. It was held by the Supreme Court of Errors, that she was not "at sea" when the time specified in the policy expired, but in a port of destination, and that the underwriters were therefore discharged. It was there conte ded on the part of the plaintiff, that the parties must have contemplated the home port as the port of destination, and that the provision "if at sea" at the end of the year, then to continue until her arrival at the port of destination, was intended to afford protection to the vessel until her arrival at her home port in New York, and that during the whole period of her absence in the prosecution of her trading voyage, the vessel was at sea within the true meaning of the policy, including as well the time of her detention in port, as the time of her sailing on the high seas.

It appeared, in that case, that the vessel had made her arrangements for returning to New York, and was contracting for freight before the year expired. In that case, it was held by both these tribunals, that such policy would expire by its limitation whenever the vessel was at an intermediate port after the expiration of the year, and the term "if at sea" did not extend the policy to her arrival at her home port of destination. Chancellor Walworth, in giving his

opinion, says, "the term sea is necessarily put in contrast with a port of destination." "Her last port of destination, when at sea, was St. Thomas, for she intended to go there for the cargo of coffee. Upon the construction contended for by the plaintiff, if the vessel had been at Baltimore on 21st January, 1836, she might have taken in a cargo upon the usual trading voyage by way of Cape Horn and the Pacific to the East Indies or China, and back by England to New York. In fact, there would be no termination of the risk until the vessel was actually lost, so long as she continued to carry freight from port to port without returning to New York, where it is said the plaintiff resides."

In answer to the case of *Wood* v. *New England Marine Insurance Co.* which was cited to that court as a decision upon that question, the Chancellor says, "the actual decision in the Massachusetts case cannot well be questioned, although the language of the judge who delivered the opinion of the court went much farther than was called for by the facts in the case on the terms of the policy. The loss occurred there before she reached her port of discharge. But if Amsterdam was intended to be a port of discharge of that vessel, and the twelve months after she had arrived in safety at that port, I cannot concur in the opinion of the learned chief justice, that the terms of the policy would have continued the risk until the return of the vessel to the port from which she sailed from the United States." In the same case in the Supreme Court of New York, it was held that "at sea" was used in opposition to being in port; and arriving at the "port of destination" means any port of destination, whether at home or abroad, for lading or discharge, or any other object of business voluntarily pursued. In *Eyre* v. *The Marine Insurance Co.*, 6 Wharton, 247, the Supreme Court of Pennsylvania, in a case where the vessel was insured "for and during the term of twelve calendar months, ending on the 10th November, 1828, with liberty of the globe, and if at sea, the risk to continue at the same rate of premium until her arrival at the port of destination in the United States," held, that upon a proper construction of the terms of the contract, the underwriters were not liable after the expiration of the year, unless the vessel was in fact on her voyage to her port of destination in the United States; that it was a contract for a limited period, and extended beyond the year only in case the

vessel was at sea on her voyage to a port in the United States.

The vessel had sailed on a voyage from Rio Janeiro, in South America, to the island of Jersey, in the British Channel, leaving on the 10th November, 1838, and had while at sea on this voyage suffered the damage for which the action was brought. The court says, that the plaintiff's construction strikes time out of the agreement, and if the intention of the parties had been as alleged by the plaintiff, no period of time should have been introduced, as it has no effect. This case differs from those we have been considering, and limits more strictly the privilege of the ship if "at sea," as she was in fact "at sea" on the day the policy expired, but as the court held, on a voyage without the terms of the contract. This case subsequently was again before the court, 5 Watts & Serg. 116, upon the question of the competency of evidence of usage among merchants and insurers, that a voyage described as this was in the policy, was understood to be an insurance that would cover a voyage from a foreign port to another foreign port, which had been commenced within the year, and the ship was lost on such voyage, and it was held that such evidence of usage was competent. The usage here offered to be shown does not, however, reach the present case. It was only to show that a vessel might be "at sea" at the expiration of the policy, if then sailing to a foreign port. This the defendants do not deny, but say, that after reaching that foreign port in safety after the year, or when she is actually in such foreign port at the expiration of the year, the limitation takes effect. That the term port of destination is applicable to any foreign port at which a vessel may have arrived in the course of her voyage is clearly recognized in various cases where the subject of seamen's wages has arisen. 2 Dane's Abridg. 461; *Thompson* v. *Faussat*, 1 Pet. C. C. 182; *Giles* v. *Brig Cynthia*, 1 Pet. Ad. 203; *Blanchard* v. *Bucknan*, 3 Greenl. 1.

The Supreme Court of New York in *Union Insurance Co.* v. *Tyson*, 3 Hill, 118, in a case where there was a provision extending the policy, "if at sea, until the arrival of the vessel at her port of destination in the United States," had held that the language fixed the port of destination to be the home port in the United States. The case of *Hutton* v. *American Insurance Co.*, 7 Hill, *supra*, did not, so far as I learn, question the character of such a policy, while it

gave an entirely opposite construction to a policy like that in the present case. We have no doubt the policy might have been so drawn as to cover the risk incurred during the whole voyage, and return to the home port, notwithstanding the vessel might have been at an intermediate port at or after the expiration of the year. But in such case it would much more resemble a voyage policy than a time policy, and time might as well be stricken out of the policy. But here the policy was one with the time of its duration limited to the period of a year. It is true that there was a condition, but this should be read as a condition adapted to a time policy. There is really no limitation if it be not the first arrival of a vessel from sea in any port, after the expiration of the year. Giving it this construction, you leave it a time policy with the reasonable condition, and one suitable and proper, to give opportunity for learning as to the state of the ship, and procuring new insurance, or if lost on a voyage not completed by her return to a port, of charging the loss upon the insurers, without any embarrassment in fixing the precise day of the loss, and showing that it was previous to the expiration of the year.

As it seems to us, the proper construction of the policy in the present case is, that if the vessel was, at the expiration of the year, in any port, or if then at sea, whenever she should return into port, although it was an intermediate port to which she had resorted for the purposes of the voyage, the conditional extension of the time beyond one year ceased to have any further effect, and that such policy could not cover losses occurring at any period subsequent, or the vessel be considered at sea at all times until her return to her home port.

The further inquiry is, was the Water Witch at an intermediate port of destination on 27th May, 1855, when the year expired? She arrived at Ypala on 19th May, commenced taking in her cargo on 21st May, and proceeded in the business of loading till the 30th May. She went then voluntarily, and under the charter party by which she was to go to Ypala, and there take a full cargo of Brazil wood. This was the situation of the vessel when the year named in the policy expired. But it is said on the part of the plaintiff, that Ypala is not a port of entry, nor a port in any legal sense, — not a haven, — not a port, as described by Lord Hale. It is conceded that it is not a port of entry and clearance and has no custom-house, that there is no

haven or harbor there, and that that part of the coast where Ypala is situated, lies open to the sea. In the charter party it was described thus, "getting a license to load Brazil wood at Ypala; to proceed to the latter port or place, and there to take a full cargo of Brazil wood." It is a place of trade for Brazil wood, and vessels proceed and stop there for this purpose. The evidence tends to show that Ypala is often called a port. It was so called in the protest in the present case, certified by the local judge. The question recurs, whether Ypala was, within the meaning of the policy, a port of destination. Was the Water Witch "at sea" during the eleven days she was lying at Ypala, taking in her loading? To some purposes, certainly, a usual place of stopping for loading or obtaining a cargo, is a port of destination. To some purposes the term port has in policies of insurance been held broad enough to embrace the case of vessels loading and unloading in an open roadstead, as in *Cockey* v. *Atkinson*, 2 Barn. & Ald. 460. In the case *De Longuemere* v. *New York Fire and Marine Insurance Company*, 10 Johns. 120, the court held that the term port might be properly applied to places resorted to and used for the purposes of loading and unloading cargoes, although they were mere open roads, having no harbors.

In the present case, the Water-Witch had certainly reached her port of destination. She had previously obtained a license to proceed to Ypala, and had accomplished that purpose. She was making no voyage, but was at rest at the place sought, and accomplishing the purpose of her voyage to Ypala, taking in cargo of Brazil wood at her leisure. She had been so situated for eleven days, the last four of which were after the expiration of the year. It is said, however, that she merely stopped on her way to Ypala, in the prosecution of a voyage to New York. This might be equally true if Ypala had been to all intents and purposes a legal port, and an unquestionable intermediate port of destination. It would have been equally true if the vessel had been lost at San Blas, which is conceded to be a port.

This policy, it is to be remembered, was a time policy, expiring by its own limitation in one year, to be extended further only "if at sea on the expiration of the year." If she would not have been at sea, within the meaning of the policy, had she been at the port of San Blas at the expira-

tion of the year, was she any more so when lying at her place of destination for taking in her cargo, at which place she had arrived eight days before the expiration of the year, and had continued there several days subsequent to that period?

Upon the facts as stated by the case presented by the parties, the court are of opinion that the defendants are not liable for a loss occurring to the vessel on the 1st June, 1855; that the condition upon which the extension of the policy was to take effect is not shown to have existed, the vessel not being at sea at the expiration of the year.

Judgment for the defendants.

NOTES OF RECENT AMERICAN DECISIONS.

Supreme Judicial Court for the Commonwealth of Massachusetts. January Term, 1860.

ASAHEL S. MANSFIELD *v.* INHABITANTS OF STONEHAM.

State Commissioner for the sale of intoxicating liquors must sell according to the statute.

This was an action of contract, in which the plaintiff, who was the State Commissioner for the sale of intoxicating liquors under the Acts of 1855, chap. 470, sued the defendants for a quantity of spirituous liquors, sold and delivered by the plaintiff to their agent, appointed under the Acts of 1855, chap. 215.

The defendants contended that the liquors sued for were sold upon a credit, and that such a sale was in violation of law, and that the plaintiff, being bound by law to sell for cash only, could not maintain this action.

The plaintiff contended that he might by law sell under his authority, and that the language of the law authorized him to sell according to the custom of merchants, which custom regards a sale to be for cash if payment is made within thirty days after delivery, and that this was such a cash sale. Evidence was admitted by the court to show such custom.

The court ruled that the plaintiff might maintain this

action, if the goods were sold on a credit, but requested the jury to find upon the evidence whether the goods were sold by the plaintiff to the defendants for cash, or upon a credit.

The jury found that the goods were sold upon a credit, and rendered a verdict for the plaintiff.

Rescript and brief statement of the grounds of the decision, by

SHAW, C. J. — The plaintiff, as a public officer, had no authority to sell spirituous liquors to a town agent, on credit; the price and terms are fixed by statute.

Exceptions sustained; verdict set aside; new trial ordered in the Superior Court.

I. S. Morse, for the plaintiff.

Train, for the defendants.

JOHN G. HAMMOND *v.* SYLVESTER EATON.

Replevin — Bond — Amendment of officer's return.

This was an action of replevin for the recovery of certain property from the defendant, who was a constable. A writ of replevin was sued out, the property was viewed by appraisers, and in the officer's return it was certified to be of the value of three hundred and twenty-five dollars and twenty cents. The plaintiff filed a replevin bond, the penalty in which was six hundred and fifty dollars. The defendant moved to dismiss the action, because the bond was not in a sum double the appraised value of the goods. But the plaintiff moved that the officer be permitted to amend his return, upon the certificate of the appraisers that they had valued the property incorrectly, and through mistake, and that the true value was three hundred and twenty-five dollars. And the court allowed the amendment. The defendant excepted to the ruling upon these two points viz.: upon the defendant's motion to dismiss the action, and upon the plaintiff's motion to amend.

Rescript and brief statement of the grounds of the decision, by

MERRICK, J.—The exceptions are overruled. *First*, because it was competent and within the authority of the Superior Court to allow the amendment; and the determination of that court upon the question of the truth of the facts alleged as the ground of the motion for leave to amend, is

conclusive. *Second*, because upon the allowance of the amendment, there is no longer anything existing, upon or for which the defendant claims that the action ought to be dismissed.

Amendment properly allowed; the motion of the defendant, that the action be dismissed, was properly refused.

C. Judd, for the plaintiff.

Sweetser & Gardner for the defendant.

BOSTON LEAD CO. *v.* PATRICK MCGUIRK.

Lost note — Proof of loss — Wrongful admission of immaterial testimony not sufficient ground to sustain exceptions.

This was an action of contract, brought to recover upon a promissory note, alleged to have been destroyed. At the trial it became a material question whether the note was destroyed. For the purpose of showing the making and destruction of the note, the plaintiff offered a witness, who testified that he was a cashier of the Merchants' Bank; that in the spring of 1857 he received a letter from the Eagle Bank, Boston, containing a note of the same tenor and description as the note declared upon, purporting to be signed by one Patrick McGuirk; that he opened the letter, read it, and also the note; that he was familiar with the signature of McGuirk, and this note was the genuine signature of McGuirk; that he put them back into his coat pocket; that the next morning he had occasion to change his coat at home, and left the letter containing the note upon the piano. In the course of the forenoon, he went home and made search and inquiry, but could not find the letter or the note, and had never seen or discovered them since he left them upon the piano. The plaintiff's counsel then asked the following question, which was objected to by the defendant's counsel: "What did you learn, upon inquiring at the house, about the note and letter?" The defendant's counsel objected to the witness stating what was told him at his house, in answer to inquiries made by the witness. But the court ruled that the witness might state what was told him at his house, while he was searching and inquiring for the note, in answer to such inquiries; and the witness stated: "I found, on inquiry at my house, that the letter and the note had been burned up by a little Irish girl at the house, while sweeping." Upon cross-examination, the

witness stated that this was told him by his wife in answer to his inquiries. The defendant asked the court to instruct the jury that the plaintiff was bound to show, in order to sustain his declaration, that the note was destroyed, and that the statements made by the witness were not competent for that purpose. The court declined so to rule, but instructed the jury that the plaintiff was bound to satisfy the jury of the destruction of the note, and that the evidence of the witness was competent for the jury to consider in relation to the question as to the destruction of the note.

A verdict was found for the plaintiff.

Rescript and brief statement of the grounds of the decision, by

MERRICK, J. — The court are of opinion that the evidence objected to by the defendant was immaterial, and its admission therefore affords no sufficient reason for setting aside the verdict.

Exceptions overruled; judgment on the verdict.

Richardson, for the plaintiff.

Sweetser & Gardner, for the defendant.

COLLINS, COMP'T, *v.* CONNERS.

Bastardy process — Defects in process cured by subsequent proceedings.

This was a complaint under the bastardy act. The defendant moved the court to dismiss the proceedings, because the warrant issued by the justice directed the officer to bring said defendant before him or some other justice of the peace, and because the officer took said defendant before another justice who did not take jurisdiction of the case further than to hold the party to answer before the justice who issued the warrant. The defendant did appear before the justice who issued the warrant, and was ordered to give bond, and did give bond, and at the same term in which the motion to dismiss was made, was surrendered, and gave a new bond by order of the court. The court ordered that the said complaint be dismissed.

Rescript and brief statement of the grounds of the decision by

BIGELOW, J. — The appearance of the defendant before the magistrate who issued the warrant, and the subsequent

proceedings there had cured any defect arising from the proceedings before the magistrate.

Exceptions sustained; case remitted to the Superior Court for further proceedings.

Morse, District Attorney, for plaintiff.

Converse, for defendant.

JOHN F. CROXFORD *v.* MASSACHUSETTS COTTON MILLS.

Trustee process — Costs.

This was a *scire facias* against the defendants, as *trustees* of Wm. Page. At the trial, the plaintiff offered in evidence a judgment of the Court of Common Pleas, at the September Term, 1857, recovered by plaintiff against Page as defendant, and said Massachusetts Cotton Mills as trustees, and execution issued Sept. 12, 1857, and demand on the trustees. Defendant offered a taxation of their costs as trustees in said original suit, made and certified by the clerk of the court, April 6, 1859.

The court ruled that the defendants were entitled to a verdict.

Verdict for the defendants.

Rescript and brief statement of the grounds of the decision by

MERRICK, J. — The defendants were entitled to costs in the Court of Common Pleas, in the original action; and they were correctly and properly taxed, though at so late a period as that stated in the bill of exceptions.

Exceptions overruled; judgment on the verdict.

Pearson, for plaintiff.

Blaisdell, for defendant.

COMMONWEALTH *v.* PATRICK SHEA.

Evidence — The time of "finding the indictment" is a time certain — Former conviction.

This was an indictment for keeping a room for the sale of liquors from July 1, 1858, to the day of the finding of this indictment, in June, 1859. One Kelly was called, and the inquiry was made whether he knew anything of the sale of liquor from the time first mentioned to the finding of the indictment. The defendant objected that this time was uncertain, and that the question ought not to be put. But

the Court admitted the question. The prosecution then put in evidence the testimony of a witness that on a certain Sunday in August, 1858, he was present and saw the defendant in his shop delivering liquor, brandy and ale, to two persons. Upon cross-examination, the witness testified, that on the next day the defendant was arraigned and tried at the Police Court in Charlestown, for keeping open his shop on the Lord's day, and that the very act above testified to was there given in evidence, and that the defendant was convicted and paid his fine thereupon. It was agreed that this evidence should be taken as if the record were produced. The witness further testified that he stated these facts before the Grand Jury, and that this was the only time he remembered of having seen the defendant in his shop. The defendant objected, that an indictment obtained upon such testimony could not be maintained, and that this evidence was not competent upon this trial. But the Court overruled the objection, and permitted the evidence to go to the jury. Another witness was called, who testified that he was sold some cider by the wife of the defendant, in his presence. The defendant objected, that this evidence was not competent to charge him upon this indictment, but the Court admitted it. The jury found the defendant guilty.

Rescript and brief statement of the grounds of the decision by

MERRICK, J. Exceptions overruled, because *first*, the time of "finding the indictment" is a time certain, and therefore the inquiry of Kelly was properly allowed; *second*, the testimony respecting sale of cider by the defendant's wife in his presence, was admissible. It does not appear in the bill of exceptions that any objection was made that cider was not intoxicating liquor, or that evidence to that effect was not submitted to the jury. *Third*, the former conviction, relied on by the defendant, was no bar to this indictment, because the offence of which he was convicted was not the same as, but different from, the offence charged in this indictment, as was determined in case of *Commonwealth* v. *Harrison*, Oct. Term, Supreme Judicial Court, 1858, Middlesex. Exceptions overruled.

Attorney-General, for government.

Butler, for defendant.

COMMONWEALTH *v.* MASON W. PRESLY.

Arrest — Reasonable and probable cause to believe that a person is intoxicated is sufficient ground for arresting him.

This was an indictment found against the defendant for an assault and battery upon one Michael Henford, on the 29 June, 1858. Before the trial the defendant filed a special plea of *autrefois acquit*, alleging a prior trial and discharge before the Police Court in Lowell for the same offence. To this plea a demurrer was filed, and, before discussion and judgment upon the said plea, the defendant moved for leave to file a new plea, but the judge refused the motion. Thereupon the judge sustained the demurrer, and allowed the defendant to plead the general plea of not guilty, and proceeded to trial.

The defendant, at the time of the alleged assault, was a police officer and watchman of the city of Lowell. There was evidence tending to prove that about nine o'clock in the evening of the 29th June, the defendant arrested Henford on a public street in Lowell, while in a state of intoxication, and committed him to the watch-house.

There was conflicting testimony upon the point of intoxication at the time of the arrest, and for the purpose of showing that the said Henford was not, at the time of the arrest, intoxicated, the government introduced the testimony of witnesses who saw him two hours before the arrest, and on the morning after the arrest; and that he then exhibited no signs of intoxication. The defendant objected, but the court admitted the evidence.

There was evidence tending to show that Presly used excess of force in the arrest, and on the way to the watch-house.

The defendant asked the court to instruct the jury, that if Presly had reasonable or probable cause to believe that Henford was intoxicated at the time of the arrest, that then he was justified in taking and retaining the said Henford. The court refused so to instruct the jury.

The court, in giving the case to the jury, instructed them that if said Henford was intoxicated, Presly had the right to arrest him and take him to the watch-house and leave him there, provided he used no excess of violence in doing so. But if Henford was not intoxicated, or if intoxicated, Presly used more violence than was necessary, and thereby

injured Henford, the jury should find Presly guilty. The jury returned a verdict of guilty.

Rescript and brief statement of the grounds of the decision by

HOAR, J. The jury should have been instructed that the defendant should not be found guilty merely from proof that the person whom he arrested was not intoxicated, if he had reasonable and probable cause to believe that he was intoxicated when he arrested him.

Exceptions sustained, and a new trial ordered in the Superior Court.

Attorney-General, for the government.

Brown and *Alger*, for the defendant.

COMMONWEALTH *v.* BRIDGET HOPKINS.

Larceny of bank bills—Description of property.

This was a complaint against the defendant for stealing three bank bills, made before a justice of the peace. The defendant was found guilty and appealed to the Superior Court, where, upon a verdict of guilty being found, a motion in arrest of judgment was made; but the court overruled it. The defendant's exceptions were to the form of the indictment; that it was defective and insufficient, in that the bank bills were not mentioned as of any denomination, and the description was therefore insufficient, and also that the bank bills should have been laid as the "property" or "moneys" of the owner, and not as "goods and chattels." The words of the indictment were, "two bank bills, each of the value of three dollars, and one bank bill of the value of two dollars, all of the goods and chattels of Patrick Mack, &c., feloniously did steal, &c."

Rescript and brief statement of the grounds of the decision by

METCALF, J. The bank bills are sufficiently described in the indictment. "Of the goods and chattels" are words of surplusage.

Exceptions overruled.

Attorney-General, for the government.

Griffin and *Boardman*, for the defendant.

COMMONWEALTH *v.* JOHN C. SANDERS.

Evidence — Declarations of persons deceased not admissible.

This was an indictment for embezzlement. The property which the defendant was charged with embezzling was

alleged, in the indictment, to belong to Allen Mason. Upon the trial, the defendant offered to prove declarations and statements of said Allen Mason, showing, or tending to show, that he was not the sole owner of the said property, but that the defendant himself had an interest in the same; that said declarations of Mason were made since the alleged embezzlement, and within three weeks prior to the trial. It appeared at the trial that Mason was then dead. The court excluded the evidence.

Rescript and brief statement of the grounds of the decision by

MERRICK, J. The evidence offered by the defendant was mere hearsay, and therefore inadmissible. It makes no difference that Allen Mason had deceased before the trial.

Exceptions overruled.

Attorney-General, for the Commonwealth.

M. Robinson, for the defendant.

RECENT ENGLISH CASES.

Court of Exchequer.

ALSOPP AND WIFE *v.* ALSOPP.

Slander—Special damage—Loss of health—Remoteness of damage.

The declaration in an action by husband and wife for slander, imputing incontinence to the wife, alleged as special damage that she had lost the society of her friends, was brought into public scandal and disgrace, and that she became ill and unable to attend to her necessary affairs and business, and that the husband incurrred expense about endeavoring to cure her.

Held, that none of the damage alleged was sufficient to support the action.

The declaration complained of the speaking by the defendant of words imputing that the plaintiff's wife H had committed adultery with the defendant, and alleged that by reason thereof the plaintiff H lost the society of her friends and neighbors; and they refused to, and did not, associate with her as they otherwise would have done; and she was much injured in her credit and reputation, and brought into public scandal and disgrace; and by reason of the committing of the said grievances, the said H became, and was,

ill for a long time, and unable to attend to her necessary affairs and business; and the said William was put to, and incurred, much expense in and about the endeavoring to cure her of the illness which she labored under as aforesaid, by reason of the committing of the said grievances; and the said William lost the society and association of his said wife for a long time in his domestic affairs, which he otherwise would have had.

Demurrer and joinder in demurrer.

Quain, in support of the demurrer.—The words are not actionable without special damage, and the damage alleged is too remote to be in contemplation of law consequent upon the speaking of the words. The first damage alleged is the loss of the society of the woman's friends. That does not import any temporal damage; and even if it did, the allegation would be too general, since it does not specify the persons by their names; Com. Dig. "Action upon the Case for Defamation," F. 20, F. 21. The illness of the wife cannot be regarded as a consequence of the slander, and is not, therefore, a ground of special damage. She ought to have disregarded the slander, and the illness is to be imputed to her constitutional infirmity, and not to the speaking of the words. The allegation that the husband expended moneys in endeavoring to cure her is still more remote. Both causes of action may now be joined by virtue of section 40 of the Common Law Procedure Act, 1852; although formerly each must have been the subject of a separate action, *Saville* v. *Sweeny*, 4 B. & Ad. 514. But the late act does not make anything a ground of special damage which was not so before. He cited Starkie on Slander, 202, and *Hartley* v. *Herring*, 8 T. R. 130; *Moore* v. *Meagher*, 1 Taunt. 39.

Prentice, for the plaintiffs.—It is difficult to contend, after the old authorities, that the general allegation of the loss of the society of neighbors is sufficient to constitute a ground of special damages; see 1 Starkie on Slander, 199, 2d ed. But the other allegation that the female plaintiff became ill in consequence is sufficient. Health is the most valuable of all possessions, and the deprivation of it, by reason of the wrongful act of another, is frequently a matter properly considered by the jury in estimating damages. Where an action is brought for an individual damage by a public nuisance, it may be that the only loss is the loss of

health. So in an action for seduction, the illness of the daughter, consequent upon desertion by the seducer, may be, it has been said, a ground of damages; *Boyle* v. *Brandon*, 13 M. & W. 738. In *Ford* v. *Munroe*, 20 Wend. 210, an American case, damages were allowed for the illness of the mother of a child killed by the defendant's negligence. He cited Sedg. on Damages, 92; Mayne on Damages, 12.

Quain, in reply, cited *Vicars* v. *Wilcocks*, 2 Sm. L. C. 300.

POLLOCK, C. B.—I am of opinion that the defendant is entitled to our judgment. There is certainly no precedent to be found, throughout the history of the law of this country, for any such special damage as that stated in this declaration being received, as a ground for rendering that actionable which would not otherwise have been the subject of an action. We ought not lightly to introduce a new element into actions of this description, recollecting to what a very large class of actions it would apply,—to all actions for a false charge against another, for giving maliciously an untrue character of a servant, and all actions of tort of that description, to many actions of trespass or even trover in which the illness of the person to whom the injury was done would be made a ground of damage. The only authority shedding any light on the argument of Mr. Prentice is afforded by the case of *Ford* v. *Munroe*, decided in the American courts. But I think we ought not, in a case like the present, opposed as it is to all the principles upon which our courts have acted during centuries, to act in accordance with that case. Our courts seem always to have taken care that persons should not be held responsible for fanciful or remote damages, or for any consequences but such as are the natural and immediate result of the wrongful act. This principle has been exceedingly well settled by recent authorities, particularly by the case of *Hadley* v. *Baxendale*, 9 Exch. 341, 2 W. R. 302, in which it was held that to admit any damages arising out of the special circumstances attending goods delivered to a carrier, so as to make the carrier responsible for them in an action for negligent delay, there must have been notice given to him of such extraordinary circumstances. With respect to slander, the courts have held that a person is not responsible for the consequences flowing from the repetition by another of a slander spoken by him. Yet it may be truly said that nothing is more common than for slander

to be repeated. However, such repetition is not a ground of damage. And there are many other consequences resulting from libel and slander for which the libeller and the slanderer are not answerable in damages. As regards the present question, the distinction is this; it depends entirely upon the particular temperament of the individual, whether the slander will affect the health; but damage, in legal contemplation, is what naturally results to mankind generally from the wrongful act, and not to a particular individual. The illness was the result of excitement, not of the slander.

MARTIN, BRAMWELL, and WILDE, BB., concurred.

Judgment for the defendant.

NEW PUBLICATIONS RECEIVED.

THE LAW OF SALES OF PERSONAL PROPERTY: BY FRANCIS HILLIARD. Author of The Law of Vendors and Purchasers of Real Property: The Law of Torts, &c. Second edition, greatly enlarged and improved. 1 vol. 8vo. pp. 515. Philadelphia: T. & J. W. Johnson & Co. 1860.

A PRACTICAL TREATISE OF THE LAW OF EVIDENCE: BY THOMAS STARKIE, of the Inner Temple; one of Her Majesty's Counsel. Eighth American from the fourth London edition: By GEORGE MORLEY DOWDESWELL, AND JOHN GEORGE MALCOLM, Esquires, of the Inner Temple; Barristers-at-law. With notes and references to American cases. By GEORGE SHARSWOOD. Together with the notes to former American editions; By THERON METCALF, EDWARD D. INGRAHAM, and BENJAMIN GERHARD, Esquires. 1 vol. 8vo. pp. 828. Philadelphia: T. & J. W. Johnson & Co. 1860.

THE LAW OF CONTRACTS: By THEOPHILUS PARSONS, LL. D., Dane Professor of Law in Harvard University, at Cambridge. Fourth edition. 2 vols. 8vo. pp. 810, 911. Boston: Little, Brown & Company. 1860.

THE INSOLVENT LAWS OF MASSACHUSETTS, WITH NOTES OF DECISIONS: By JOSEPH CUTLER, Counsellor at Law. Third edition. 1 vol. 8vo. pp. 144. Boston: Published by the Author. 1860.

THE DUBLIN SUIT: Decided in the Supreme Judicial Court of New Hampshire, June, 1859. In chancery. Pamphlet. pp. 122. Concord: G. Parker Lyon. 1860.

THE RIGHT OF AMERICAN SLAVERY: By T. W. HOIT. Pamphlet. pp. 51. St. Louis: L. Bushnell. 1860.

STATE RIGHTS, AND THE APPELLATE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES. A Constitutional argument: By a Member of the Rock County Bar, (Wisconsin.) Pamphlet. pp. 50. Beloit. 1860.

INTELLIGENCE AND MISCELLANY.

PORTRAIT OF CHIEF JUSTICE SHAW AND THE ESSEX BAR ASSOCIATION. The gratitude of the profession especially, and of all the people of the State, is due to the Bar Association of Essex County for their considerate action in procuring the full-length portrait of the chief justice of the Commonwealth, — and to the public authorities of the county, for their commendable liberality in framing the painting, and giving it a permanent position in the court-room at Salem, where it is placed in the rear of the bench. The portrait is, in the language of the report of the committee of the bar, "a most faithful and true delineation of the form and features of Chief Justice Shaw;" and the distinguished artist has been most happy in giving such character and soul to the picture, that all those who look upon it and know the original, feel that it is the true embodiment of the man and the judge.

On the 9th of May the formal ceremony took place at Salem, of presenting to the court a report of the doings of the Bar Association, and of asking that their memorial might be placed on the records of the court. The report was presented by Judge Otis P. Lord, who, after a few prefatory words, read it, and moved that it be entered upon the record of the court. William C. Endicott, Esq. seconded the motion in behalf of the bar, in a neat address, eulogistic of the chief justice and of the artist. The attorney-general, Hon. Stephen H. Phillips, made a few remarks, after which the court granted the motion of Judge Lord. We give in full the memorial of the Bar Association and the response of Mr. Justice Metcalf.

COMMONWEALTH OF MASSACHUSETTS.

ESSEX, ss. Supreme Judicial Court, May Term, 1860. — His Honor THERON METCALF, Presiding Justice.

The Memorial of the Essex Bar Association, relative to the Portrait of Chief Justice Shaw.

The Essex Bar Association, at their annual meeting, held by adjournment, January 4, 1859, deeming it an honorable duty to themselves, not less than to the public, to do what was in their power to perpetuate the form and features of the venerable chief justice of the Commonwealth, passed the following votes: —

"That the Essex Bar Association request His Honor the Chief Justice, to sit for his portrait, at the expense of the Association; the same to be held by them, and placed in some suitable position in the court-room in the court-house in Salem,—in appreciation of the great public services of His Honor, and the unsullied purity of his private and judicial life.

"That the President of the Association be requested to communicate to His Honor the foregoing vote of the Association, and request his assent thereto.

"That the President, together with Messrs. Huntington and Endicott, be a committee with full powers to carry into effect the foregoing vote, in case the same shall be assented to by His Honor the Chief Justice."

In pursuance of the object contemplated by these votes, the Committee immediately made known to the chief justice this wish of the Association, with which he was pleased to comply, leaving to them the designation of a suitable artist. This duty the committee performed, in the selection,

after great consideration, of Mr. William M. Hunt, an eminent artist, residing at Newport in the State of Rhode Island, who at once entered upon the performance of the work, inspired no less by devoted admiration of his subject, than by enthusiastic love of his profession. The work was executed during the spring and summer, and was ready for its place at the commencement of the present year.

The public authorities of the county, upon the request of the Association for liberty to place the portrait in this hall,—here to offer it to the view of all citizens of the Commonwealth forever, — desired, in behalf of the county whom they represented, in some measure to co-operate with the Bar Association, in token of the appreciation of the character of the chief justice; and, in this view, requested the artist to cause to be prepared, on behalf of the county, a frame suited to the portrait. Such a frame was made after the design of Mr. Richard M. Hunt, of the city and State of New York, in conference with his brother, the artist.

The work thus done is before us. The portrait, as we see it here, was put in place, under the immediate supervision of the artist, on the 22d day of December, 1859.

At a meeting of the Bar Association, December 19, 1859, the committee made a report of their doings, whereupon it was voted by the Association: —

"That the committee having in charge the matter of procuring a portrait of Chief Justice Shaw be requested to prepare a suitable memorial for presentation to the Supreme Judicial Court, at its next term in this county, with a request that it be entered on the records of the court in commemoration of His Honor the Chief Justice, and of this portrait,— and that such memorial be reported to the Association at some future adjournment of this meeting."

Under these instructions, and in behalf of the Essex Bar Association, at this, the first term of the Supreme Judicial Court since the portrait has occupied its appropriate place over and above the judges sitting from time to time in this temple of justice,—a fit emblem of the presiding genius of the place,—the committee ask leave to present to the court an expression of the great respect and cordial personal regard of every member of the Bar Association for the venerable and eminent chief justice of the Commonwealth, and respectfully pray that the same may be entered of record in this court, in perpetual remembrance thereof.

Lemuel Shaw, whose father was a clergyman at Barnstable, in the County of Barnstable in this Commonwealth, was born in that town on the 9th day of January, in the year 1781. He was graduated at Harvard University, in the class of the year 1800. He was admitted to practice as an attorney-at-law in the County of Hillsborough and State of New Hampshire, in August, A. D. 1804, and was afterwards admitted to the bar of Massachusetts, at the Circuit Court of Common Pleas for the Old Colony, in November of the same year. He was admitted to practise as an attorney in the Supreme Judicial Court, at Boston, in the County of Suffolk, at the March Term, A. D. 1807, and in due course as a counsellor of the same court.

From the time of his admission to the bar, he has been almost exclusively a servant of the law. For though, at times, he has served in both branches of the State Legislature, and was one of the eminent among the celebrated men who composed the Convention for Amending the Constitution of the Commonwealth in 1820, his life has been, in the largest measure, a ministry at the altars of law.

He was appointed, from the bar, to the office of Chief Justice of the

Supreme Judicial Court of the Commonwealth of Massachusetts, by commission bearing date August 31, A. D. 1830, took and subscribed the oaths of office on the same day, and immediately entered upon its high duties. The first term of the court in the County of Essex, at which he presided, was the Law Term, in November, 1830, all the judges being present. The first term, for trials by jury, which he held in this county, was the April Term, 1832, at which he delivered a charge to the grand jury, which, at their request, was published.

It is matter of the highest satisfaction, upon which judges and the bar alike congratulate themselves, that we have before us here, in this hall of justice, a most faithful and true delineation of the form and features of Chief Justice Shaw. Here let it remain from generation to generation, that those who come after us may see and know what kind and manner of man in visible presence he was, whose judgments will remain alike monuments of his great learning and immense labors in all the walks of jurisprudence, and precedents for future jurists, forever.

It is fit that we should thus gratify the reasonable desires and curiosity of a distant posterity. It is fit that we should, as we now do, dedicate to the coming generation this consummate work of art, with our attestations of its exact fidelity in form and lineament to the living judge who has gone in and out before us for thirty years. It is fit that we should make known to posterity, at what epoch in this illustrious life they behold the form and features of the great judge, whose life is not more illustrated by the virtues of the eminent magistrate, than of the kind-hearted, excellent, and upright man. But it is not fit that the present be made an occasion for eulogy.

How he has presided in the high judicial places of the Commonwealth, during those thirty years,—how his life has been illustrated by the faithful and most laborious discharge of all his high functions in these honorable and honored walks of jurisprudence, — it is not for us, here and now, to say.

Our duty and our purpose now is, to make manifest, in all future time, our appreciation of the magistrate and the man, — to testify of our great respect and most cordial regard for the high official and personal character of the chief justice, as witnesses of his judicial labors for a whole generation,—and, so far as we may, to preserve, when we shall see his face and form no more, an image of both, alike honorable to art and truthful to life.

And may God, in his kind providence, put far off the day when the higher, sadder, and severer duty of eulogy shall devolve upon us, or upon those who succeed us.

In behalf of the committee, O. P. Lord, *Chairman.*

RESPONSE OF JUDGE METCALF.

Gentlemen of the Bar: I heartily concur with you in the declaration that it is fit that you should thus gratify the reasonable wishes and curiosity of distant posterity. And distant posterity will be grateful to you for gratifying those wishes and that curiosity respecting so eminent a man and magistrate as the chief justice of this court by an exact representation of his person in a painting of surpassing skill.

You rightly say that it is not fit that the present should be made an occasion for eulogy. What you *have* said, in your memorial, concerning the character and services of the chief justice, is strictly just. And wishing to follow your commendable and decorous reserve, I will add merely the fact that he has had a seat on the bench of this court longer than any former judge, except the first Chief Justice Lynde, Chief Justice Dudley, and

the late Justice Wilde, whom we all venerated and loved, and who would have rejoiced to see this day and witness this transaction in honor of one with whom he was long and happily associated.

And now, gentlemen, I will say no more, except to assure you that I cordially join with you in the wish and hope which you have put on record, — and in which I know that the other associates of the chief justice fervently unite, — that this great work of art, so honorable to you and so creditable to the artist, may remain from generation to generation, so that those who come after us may see and know what manner of man, in his visible presence, the chief justice was. *Vir honoratissimæ imaginis futurus ad posteros.*

Legislation of Massachusetts in the Session of 1860. — The legislature of Massachusetts at their recent session ending in April last, by general consent adopted as a rule of conduct the principle that they would not, under the peculiar circumstances of the session, act upon general legislation. The preceding legislature did not close their labors until the very end of the previous year. They had passed the act known as the General Statutes, which could not be printed until after the session was closed. The exact provisions of the General Statutes were not known, and it would have been groping in the dark had they attempted general legislation upon the subjects included therein. The members therefore wisely, as we think, contented themselves, as a general thing, with special legislation, and with correcting and explaining such matters in the General Statutes as were brought to their attention. In some instances, as in the matter of criminal costs, of equalizing the shares of corporations, and in the act establishing a system of public warehousing, they seem to have departed from the general rule.

Six acts were passed respecting banks, and matters connected therewith. Three of them (chap. 2, 51, and 170) relate to the countersigning, delivery, and destruction of circulating notes of banks doing business under the general law. Chap. 124 touches the alleged controversy between the Bank of Mutual Redemption and the Suffolk Bank in regard to the redemption of bank bills by banks like the two named. Chapter 167 gives the much needed authority to receivers of broken banks to provide by assessments on the stockholders, whether individuals or corporations, for the speedy redemption of their circulation. Chapter 209 regulates the number and qualifications of directors in certain banks, and puts a restriction upon their loans and discounts. The same chapter has certain provisions concerning the plates for bank bills, designed to make the counterfeiting thereof more difficult.

There is but a single general act relating to railroads, (chap. 201.) It gives railroad corporations existing by the laws of any other State, and having occasion to use in this State portions of certain connecting roads, the privileges of the Acts of 1845, chap. 191; and 1857, chap. 291. In this connection we would call attention to one portion of the new statute provision in section 9 of chap. 181 of the General Statutes, and show its probable operation upon this act of the legislature and upon numerous others where similar references are made. The acts of 1845, chap. 191, and 1857, chap. 291, are expressly repealed by chapter 182 of the General Statutes. The provisions of those Acts are incorporated into chap. 63 of the General Statutes. Section 9 of chap. 181 provides that "references in laws not repealed to provisions of laws incorporated into the General Statutes and repealed, shall be construed as applying to the same provisions so incorporated." By this means the references in chap. 201 to the acts repealed

are made to apply to the same provisions of law now in force in the General Statutes; and all question whether chap. 201 would carry with it by the references therein, the provisions of the chapters referred to, after the acts themselves had been repealed, is saved.

Chapter 149 deals another blow at the fraudulent mutual fire insurance companies, now fortunately reduced to a limited number in this State by the energetic action of the proper authorities. It provides, by a fine of not over five hundred dollars for each offence, for the punishment of any officer or director of a mutual fire insurance company who either officially or privately gives a guaranty to any policy holder against the assessment to which he would otherwise be liable by the provisions of chap. 58 of the General Statutes.

Chapter 197 establishes a fixed and definite limit of time which a person on whom a bill of exchange or draft is drawn that requires acceptance, shall have in order to decide whether or not he will accept the same. By this act such person will have until two o'clock in the afternoon of the business day next succeeding the first presentation thereof in which to come to such decision. But whenever a bill or draft is thus held over one day, it shall, when accepted, date from the day of presentation.

There are two acts, chapters 65 and 70, respecting attachments. The former exempts from sale or levy on execution, one sewing-machine, not exceeding one hundred dollars in value, in actual use by each debtor or the family of the debtor. Chapter 70 provides that attachments of real estate and leasehold estates for more than seven years from the making thereof, shall not be valid against purchasers for a valuable consideration and in good faith, who are not parties defendant to such process, except from the time the writ or copy is deposited in the clerk's office. Would *mortgagees* be included in the description "purchasers for a valuable consideration?"

Chapter 60 cures difficulties that are sometimes experienced in sales of real estate by executors and others authorized by license of court. No such sale, and no title under such sale, will be void on account of the deed not having been executed and delivered within one year after the granting of the license, nor on account of *any irregularity* in the proceedings, if the *license*, *bond*, *oath*, and *notice* of time and place of sale have been according to law, and the *price* for which the land was bid off at auction, has been *paid* by a bona fide purchaser.

The session could not end, and we believe a session of the legislature rarely ends, without legislation on the subject of paupers. Chapter 83 is an act relating to the removal of State paupers. The purpose of the act, viz: Empowering the alien commissioners to remove from the State a person who has received a permit to become an inmate of a State almshouse or hospital, before, and instead of committing him to the State institution, and in making the usual returns, entering such person as having been received into and discharged from the almshouse or hospital, — is rather to be guessed at from the purport of the chapter, than to be gathered from any clear and perspicuous statement in the statute itself.

Certain proceedings in insolvency in the counties of Worcester and Franklin, declared invalid by the principle of the decision in Grafton Bank *v.* Bickford, 22 L. R. 592, are confirmed by chap. 78.

Hereafter the offence of a single act of drunkenness will not be known to our statute law. The disease or vice of intoxication must become so habitual and confirmed as to make a person a common drunkard, before the law will interfere to help to cure, or to punish. Chapter 166 provides that "no person shall be fined or imprisoned for drunkenness, except as a

common drunkard," &c. The ancient prejudices of the people of the Commonwealth are however recognized to a certain extent, as the statute permits the proper officers to arrest persons found drunk, and to detain them until they are sober.

Prosecuting officers will congratulate themselves upon the provisions of chapter 186, concerning the form of indictment for perjury and subornation of perjury. Hereafter, in indictments for perjury, it will be sufficient to set forth the substance of the offence charged upon the defendant, (if the perjury be alleged to have been committed in a criminal case,) or the nature of the controversy, in general terms, (if the perjury be alleged to have been committed in a civil case, or proceeding,) and by what court, or before whom the oath was taken, without setting forth the commission or authority of such court or person, or any part of any proceeding, either in law or equity. In indictments for subornation of perjury, when the perjury has been actually committed, it will be sufficient to set out the offence of the person who committed the perjury, and then to allege that the defendant caused the said person to commit the said perjury. If the perjury has not been actually committed, it will be sufficient to set forth the substance of the offence charged upon the defendant.

Chapter 187 shortens the term of office of those designated as trial justices to three years, and permits the governor, with the advice and consent of the council, to revoke at any time the designation of trial justice, saving to them the right to finish any business commenced before them.

Chapter 191, defining the costs of criminal prosecutions, which takes effect on the first of July next, is one of the most important acts of the session. How far the details of this act differ from or agree with the provisions of the General Statutes, upon the same matters, or how fitly the fees for particular services are graduated in respect to the duties to be performed, or how the pay of particular officers is affected, we have not made any special examination to ascertain. The officers who are most affected by the provisions of the act, ought to be paid by fixed salaries, irrespective of fees, sufficient to compensate them for their services and responsibilities. The importance of the act arises from the fact that by it the whole expenses of criminal prosecutions are thrown upon the counties, without reimbursement as heretofore, of two thirds thereof from the State. We believe this to be right and expedient, and that the best practical method of solving the difficult question of how the expenses of criminal prosecutions shall be kept within proper economical limits, is to throw the whole burden upon those local jurisdictions that are responsible, morally at least, for the existence of the crime and the commission of the offences, and that have the strong inducement of direct pecuniary interest to see that all those who are connected with the administration of the criminal business shall conduct it with a due regard to economy. That class of justices of the peace, who have in times gone by, if reports are true, kept an open sho[p] for the manufacture and multiplication of criminal complaints, will drive a less brisk business when they know not only that their ill-gotten gains are to be paid for by their neighbors, but that their neighbors are directly interested in seeing that the fees are properly and honestly earned. Prosecuting officers, upon whom the chief duty devolves of conducting the criminal business with a due regard to economy, elected by the votes of their districts, and therefore, directly responsible to them, will have an additional incentive to the faithful and impartial discharge of their duties, not only in checking unnecessary expenditures, but also in making available all proper sources of income to their districts. And perhaps it may not be beneath the dignity of the courts, while bearing everything else in mind, not to neglect entirely economical considerations.

We designed to allude to but one other act of this session, namely, chapter 206, establishing a system of public warehousing, which is novel, and deserves more consideration and space than we have now left to devote to it. We may refer to it hereafter.

THE GENERAL STATUTES OF MASSACHUSETTS. — The volume of the General Statutes was completed before the day (June 1) established for the statutes going into operation, although the time given for the preparation of the work was so short, that a full supply of the volumes could not be ready at that date. The editors endeavored to keep the book within such a number of pages that it could be handled with comparative ease. To do this, it was necessary to increase the size of the page, both in length and width, as compared with the page of the Revised Statutes. Four lines have been added to the length of the page, and two *ems* to its width. This keeps the volume within a reasonable size, and at the same time the page is not uncomely. The Statutes have been carefully compared with the rolls. The references in the margin have been taken mainly from the commissioners' report, and without any additional verification; because they were carefully verified in the report, and corrections had been made therein, of any discovered errors; and also because sufficient time was not given for such additional verification. Other marginal references have been made to later reports and statutes. The index has received great care and labor. In printing it in two columns, the precedent of the edition of the laws of 1823 was followed, and it was thought that in this form the eye could more readily catch the subjects. The arrangement is to a certain degree analytical, which, it is thought, will facilitate examination. The references in the index were all once verified; but in the subsequent transpositions of portions of the printed matter, and in the inserting of new entries, sufficient time was not left to verify the references anew. Consequently there are undoubtedly some mistakes of reference, as well as typographical errors. The editors would be glad to be informed of any that are discovered, in order that the plates may be corrected before the next edition is printed, — which will be soon done.

OBITUARY NOTICES.

We take from the Law Magazine and Law Review for May, 1860, the following obituary notices of Sir William H. Watson, and Thomas Jarman, with whose names and works the profession in this country is familiar.

THOMAS JARMAN, a name familiar to the English jurist will henceforth be missed from the roll of practising lawyers. On February 26th, in the present year, after a practice at the bar of thirty-four years, Thomas Jarman died.* We say his *name* will be missed, for few were acquainted with the man himself. The victim of severe disease, and eccentric in habits, Mr. Jarman was personally less known in the profession than any other counsel of equal eminence. Though his memory will long survive in his works, it is not fitting that the man should pass from among us without some, though it be inadequate, notice in our pages. We will avail ourselves of the well-written sketch in the *Solicitors' Journal* (March 10th) for the few facts we shall here mention relating to Mr. Jarman. The writer of this sketch had fortunately the advantage of obtaining some

* He was called by the Middle Temple in February, 1826.

interesting information upon the subject of the memoir from Mr. Hayes, the well-known conveyancer, who perhaps is one of the few persons competent to give an authentic statement about the life and character of his ancient friend. Speaking of Mr. Jarman's publications, Mr. Hayes writes:—

"Those works which are now in every counsel's and judge's hands, were composed under physical difficulties, over which nothing but moral courage, almost heroic, could have triumphed,—the works of a laborious valetudinarian and energetic cripple. The earlier, and indeed greater, part of his life was spent 'helping (to use his own words) other men into their carriages,' or, at any rate, to easier seats in their carriages. As a lawyer he was entirely self-educated, with the exception of such schooling (not completed) as the practice of a Bristol attorney's office could supply. And with this minimum of instruction, and his own much larger unindebted acquisitions, aided by a strong yet modest consciousness of power, the raw youth came to London scarcely less well prepared, or in any respect less competent to write a standard work on Wills (or even to supply that grand desideratum, a treatise on instruments generally) than at any after period of his professional life. His habits of study throughout a considerable portion of the period which produced his 'Wills' and his 'Conveyancing,' were primitive and pastoral. He read, thought, and worked in open air; his study, a garden, green lane, or paddock; and that, under all skies, and in all weathers, and through all seasons. Of the work done in chambers, much was done in severe weather, with open windows, and without a fire. Though I could not quite harden myself to these extremes, yet our tastes were so far alike, that it was our wont in those early days of 'Jarman's Powell,' to discuss points and settle them very much to our own satisfaction, and eventually, in some instances, to the satisfaction of the judicature, at Jack Straw's Castle, the Woodman of Old Norwood, and on the Cotswold. I well remember on reading in manuscript the chapter which treats of cross-remainders, being so much struck with its lucid mastery of the subject, that I immediately took it to my acuter and more experienced friend, R. H. W. Ingram, then practising in the Temple, who at once acknowledged its superiority to Cruise, then, and to the discredit of bar and bench for some years afterwards, cited as oracular. The proofs were supervised by both, but with more critical attention by Ingram, who contributed more or less to the accuracy of Jarman's labors; but the whole amount of such aids left the sterling and staple matter of the annotations and supplementary volume, exclusively the product of the editor's own talent and research, under circumstances far from propitious. When all was ready for publication, a patron was to be sought, and Lord Eldon was obviously the fittest name for such a work. Jarman sketched out a dedication, and, being then our visitor at Peckham, read it to us in the evening; but I objected to its wanting spice and unction, and came down the next morning with something more easy, against which Jarman in his turn protested, but which, somewhat lowered in its tone of adulation, he rather reluctantly adopted; and this is the dedication which (I think) Horace Twiss, in his 'Life of Lord Eldon,' cites among other testimonials in proof of the high judicial reputation of the greatest of the Great Seals of later times.

"The progress of 'Jarman's Powell' was slow and obscure. Powell was a *caput mortuum*, weighing down a living body of sound law; Jarman a vitality, dragging about with him a sort of semi-defunct Frankenstein. I have an impression, but it may be erroneous, that Mr. Baron Parke was among the first to discover the value of the work on Wills, and bring it

into court, — though probably it first struck root in the dusty chambers of conveyancers, and thence gradually spread over Westminster Hall, where very possibly it may have assisted in the solution of many a problem before it found either the hardihood or candor requisite to cite and commend it as a text-book. Sweet, the publisher, used to insinuate, as I understood Jarman once to say, that a book on Devises was 'caviare to the general,' and that a much brisker sale would have been insured by the more intelligible title of a treatise on Wills. In this there may have been something of sly irony. By the way, in any sketch of Jarman's professional career, justice ought to be done to Sweet, as a bold and liberal patron of young, untried writers.

"Poor Jarman's labors were repeatedly suspended, sometimes apparently brought to a final close, by serious illness: first, (while Powell was in hand,) by an affection of the eyesight; then by an abscess extending nearly from hip to heel, and terminating in a fixed limb, and more recently by an attack so severe that both body and mind were supposed to be hopelessly prostrated; but he survived these (and other) trials, to resume and complete his laborious undertakings, and to work on at conveyancing generally, but more especially the case department, with increasing reputation and practice to the last. Nothing could subdue his fortitude or disturb his equanimity. *Æquam memento rebus in arduis servare mentem*, was the Pagan motto of the Christian soldier."

The vicissitudes of Jarman's professional career are thus referred to by the writer in the Solicitors' Journal:—

"Three times in the course of his career had Mr. Jarman to seek relief from pain and illness by a temporary relinquishment of his profession; and on his return to practice he had, of course, each time to commence anew. It is no wonder, therefore, that those who knew him well, — and from his weak state of health they were necessarily few, — speak with enthusiasm of the heroism of his character. So great strength of will, and so resolute a purpose, are not given to many who are troubled with such weakness of body. Even in his temporary seclusion, while the victim of painful disease, he was still to be found working at his books, although unfit for the more regular and active duties of his profession. At such times his delight was to have as much of his library as possible around him in the open air; if in the middle of a field, so much the better. On one occasion a friend found him standing at a desk under a tree in one of his fields, with law-books lying all around him, in a space from which the snow had just been cleared away, — one of his peculiarities being his antipathy to fires, and his indifference to even severe degrees of cold. It was well for him that he loved the work for its own sake; for, great as was the ultimate success of his first and best effort, he has been heard to say that his pecuniary returns from it never exceeded an allowance of eighteenpence a day for the time during which he was occupied in writing it. Such honors and emoluments, however, as may fall to the lot of conveyancing counsel were not denied to him, except so far as the latter might be lessened by the effect of his chronic indisposition."

Thus, without fortune or connection, and in spite of many and grievous difficulties to be surmounted only by moral courage and intellectual vigor, Mr. Jarman achieved a notable place in the profession, to which moreover he has done eminent service as an author. The successful lawyer of the courts, who is seen and heard everywhere, as soon as he has run his course is never again called to professional or public recollection. He has filled the stage for his day, and makes way for others as good as he, who in their

turn engage all the attention of the spectators. The retired chamber counsel, on the other hand, who has dedicated his best faculties to expounding by his pen the jurisprudence of his country, survives as long as the law itself with which he has connected his name.

As a writer, Mr. Jarman was by no means elegant,— nay, sometimes his style was obscure. The difficulty he had of expressing his ideas in perspicuous language, was probably the reason why his drawing was never admired by the best judges of the art of conveyancing; nor had he received in his early professional career, that best of legal education, which consists in actual *drawing* under the eye of an able master, and gathering experience in chambers well supplied with varied work. Moreover, some men's minds are better fitted for fixing on points and elaborating principles, whilst the skill of others, who form the larger portion of the class of practical and successful lawyers, applies rules and deals with facts in the manner most useful to the world, which rewards them accordingly. For such reason Mr. Jarman probably never had a large or leading general business as a conveyancer corresponding to his reputation.

A memoir of Mr. Jarman, which merely referred to his ability and fortitude, would omit the mention of qualities which were even more admirable than these,— that patience and kindness which seemed nourished by what might well have soured or irritated a person of a different character. He was, it is true, respected for his professional attainments by those who had not his personal acquaintance; but his friends will remember with enduring regard, that he was not only an able lawyer, but a generous, unworldly, kind-hearted, and Christian man.

Baron Watson. — The sudden death of Baron Watson at Welshpool, on the 12th March, is an event which has caused deep regret throughout the profession. His frank, honest character rendered him a very popular man during his long career. From 1811 to 1817, he was in the army (1st Royal Dragoons). He then joined the legal profession, and enjoyed, first as a special pleader, and afterwards at the common law bar, an extensive practice. In 1843, he was created Queen's counsel. His two works on Arbitration and the Office and Duties of Sheriff have become standard books with lawyers.

His oratorical powers were not of a high order. Earnestness and energy, however, supplied the place of finished eloquence and correct style. He ever stood up so bravely and honestly in his client's interests, that his awkward language and obscure expressions were overlooked by the tribunals he addressed; moreover, he "knew his law," and when he had a bad case, he never sheltered himself at the expense of his client's cause. There were few leaders with whom junior counsel felt safer.

He was a very genial man, and possessed that excellent gift for barristers, whether in court or on circuit — that of being a good narrator of anecdotes. The "General," as he was often called, was, as the leader of the Northern Circuit, highly esteemed by its members; and be it remembered the character and comfort of a circuit depends much upon the social and personal qualities of its leaders.

He was promoted to the Bench in 1856, having been passed over on several occasions, when he and his friends thought he had a right to be appointed a judge.

He sat in Parliament first for Kinsale, and afterwards for Hull, on the Liberal interest. He was only sixty-four when he died.

INSOLVENTS IN MASSACHUSETTS.

Name of Insolvent.	Residence.	Commenceme't of Proceedings.	Name of Judge.
		1860.	Returned by
Abbott, Charles F.	Methuen,	Date not given	Geo. F. Choate.
Atkinson, John, Jr. (1)	Melrose,	April 2,	Wm. A. Richardson.
Barnard, Henry F.	Andover,	" 11,	Geo. F. Choate.
Barney Mason	Swanzey,	Dec. 13, 1859.	Edmund H. Bennett.
Batchelder, John A. } (2) " Joseph A. }	Middleton,	Feb. 8, 1860.	Geo. F. Choate.
Binney, Omar	Boston,	April 12,	Isaac Ames.
Brown, Samuel P. I.	Lynn,	Feb'ry 4,	Geo. F. Choate.
Bullard, Amasa	New Bedford,	Jan. 28,	Edmund H. Bennett.
Burnham, Addison P. (3)	Manchester,	March 24,	Geo. F. Choate.
Cape Cod Telegraph Co.	Boston,	April 23,	Isaac Ames.
Carey, Augustus C.	Lynn,	Feb'ry 27,	Geo. F. Choate.
Carr, William	Fall River,	" 15,	Edmund H. Bennett.
Chase, Wm. C.	Sutton,	April 20,	Henry Chapin.
Chase, Wm. C. (4)	"	" 21,	"
Clough, Luther L. (1)	Malden,	" 2,	Wm. A. Richardson.
Collins, Seth	Falmouth,	" 12,	J. M. Day.
Conners, Philip	Lowell,	" 3,	Wm. A. Richardson.
Cotton, Lewis	Boston,	" 13,	Isaac Ames.
Crafts, Walter V. (3)	Manchester,	March 24,	Geo. F. Choate.
Crane, Joseph A.	Fall River,	Dec. 29, 1859.	Edmund H. Bennett.
Cutting, Hiram G.	Boston,	April 16, 1860.	Isaac Ames.
Davis, Charles A. } (5) " George E. }	Natick,	" 2,	Wm. A. Richardson.
Delano, Mansfield H.	E. Bridgewater,	" 26,	Wm. H. Wood.
Dodge, Ira B.	Wenham,	March 24,	Geo. F. Choate.
Eames, Daniel } (6) " Geo. L. }	Hopkinton,	April 18,	Wm. A. Richardson.
Ellis, Lorenzo (7)	Holliston,	" 10,	"
Emerson, George G.	Lynn,	" 12,	Geo. F. Choate.
Farrar, James	Malden,	" 11,	Wm. A. Richardson.
Farrington, John B.	Dedham,	" 2,	George White.
Fauteux, George L. (8)	Chelsea,	" 2,	Isaac Ames.
Ferguson, Thomas	Boston,	" 4,	"
Gardner, John (9)	Salem,	March 19,	Geo. F. Choate.
Gates, Thomas	Worcester,	April 3,	Henry Chapin.
George, Thomas M.	Marshfield,	March 24,	Edmund H. Bennett.
Goodwin, Wm. F.	Boston,	April 7,	Isaac Ames.
Gould, Robert	Roxbury,	" 27,	George White.
Gushee, Dennis S.	Raynham,	Feb'ry 23,	Edmund H. Bennett
Hall, Claudian H. (10)	Boston,	April 3,	Isaac Ames.
Hardwick, John	Quincy,	" 3,	George White.
Hardwick, Wm. P.	"	" 21,	"
Harlow, Dexter	Boston,	" 30,	Isaac Ames.
Hillman, Roland L. (11)	New Bedford,	Dec. 23, 1859.	Edmund H. Bennett.
Holden, Hendrick	Sherborn,	April 28, 1860.	Wm. A. Richardson.
Holmes, Thomas C.	Kingston,	" 24,	Wm. H. Wood.
Houchin, Thomas W.	Worcester,	" 18,	Henry Chapin.
Hunting, Wm. B. (7)	Holliston,	" 10,	Wm. A. Richardson.
Hursell, John	New Bedford,	Nov. 1, 1859.	Edmund H. Bennett.
Hutchinson, Osgood	Lawrence,	April 20, 1860.	Geo. F. Choate.
Knights, Wm.	New Bedford,	Dec. 21, 1859	Edmund H. Bennett.
Knowles, Nath'l G.	Haverhill,	March 7, 1860.	Geo. F. Choate.
Larned, Wm.	Dudley,	April 11,	Henry Chapin.
Le Gro, Edmund	Danvers,	March 9,	Geo. F. Choate.
Lemme, Charles } (12) " Ferdinand }	Newton, } Boston, }	April 24,	Isaac Ames.
Lowe, Henry J.	Fitchburg,	" 23,	Henry Chapin.
Mayo, David	Brewster,	" 2,	J. M. Day.
Miller, Daniel	Pawtucket,	Nov. 8, 1859.	Edmund H. Bennett.
Montgomery, Geo. K.	Boston,	April 27, 1860.	Isaac Ames.
Moseley Flavel } (13) " Fred'k P. }	Dorchester,	" 9,	George White.
Nichols, George M. (14)	Monson,	Feb'ry 23,	John Wells.

INSOLVENTS IN MASSACHUSETTS—*(continued)*.

Name of Insolvent.	Residence.	Commencem't of Proceedings	Name of Judge.
Nightingale, Wm. H.	Milton,	April 17,	George White.
Noyes, Hosea	Melrose,	" 6,	Wm. A. Richardson.
Nye, Wm. F.	New Bedford,	Jan. 2,	Edmund H. Bennett.
Osgood, Alfred M. (11)	"	Dec. 23, 1859.	"
Page, David	Bedford,	April 30, 1860.	Wm. A. Richardson.
Paine, Elkanah, 2d	Truro,	" 30,	J. M. Day.
Parker, Niles G.	West Newbury,	" 17,	Wm. A. Richardson.
Patch, Ephraim (9)	Salem,	March 19,	Geo. F. Choate.
Paul, Wm.	Lynn,	Feb'ry 27,	"
Phillips, George A. (13)	Dorchester,	April 9,	George White.
Price, Benj. S. (12)	Boston,	" 24,	Isaac Ames.
Rider, Samuel G.	Dartmouth,	Dec. 17, 1859.	Edmund H. Bennett.
Root, Laurens M. " for himself & the firm of L. M. & A. C. Root (15)	Chester,	April 14, 1860.	John Wells.
Sanford, Horatio G.	Gloucester,	March 10,	Geo. F. Choate.
Sayer, James F. " Wm. H. (16)	Boston,	April 18,	Isaac Ames.
Shaw, John H.	Nantucket,	Nov. 1859.	E. M. Gardner.
Shaw, Samuel (14)	Monson,	Feb. 23, 1860.	John Wells.
Shepard, John F. (8)	Chelsea,	April 2,	Isaac Ames.
Sibley, John S.	Salem,	" 20,	Geo. F. Choate.
Sibley, Sarah (4)	Sutton,	" 21,	Henry Chapin.
Simonds, Wm.	Winchester,	" 23,	Wm. A. Richardson.
Stetson, Jotham	Medford,	" 16,	"
Tappan, Amos	Newburyport,	March 14,	Geo. F. Choate.
Tuck, Uriah G.	Nantucket,	January,	E. M. Gardner.
Walcott, Jabez E.	Boston,	April 16,	Isaac Ames.
Wheeler, George W.	Somerville,	" 4,	Wm. A. Richardson.
Whiting, Erastus W.	Oxford,	" 10,	Henry Chapin.
Woodman, Charles F.	Boston,	" 3,	Isaac Ames.

FIRMS AND COMPANIES.

(1) Atkinson & Clough.
(2) J. A. Batchelder & Co.
(3) Burnham & Crafts.
(4) Wm. C. Chase & Co.
(5) C. & T. Davis.
(6) George L. Eames & Co.
(7) Hunting & Ellis.
(8) Shepard & Fauteux.
(9) Gardner & Patch.
(10) Woodman & Hall.
(11) Hillman & Osgood.
(12) Lemme, Price, & Co.
(13) Phillips & Moseley.
(14) Tunic Mills Co.
(15) L. M. & A. C. Root.
(16) Sayer Brothers & Company.